

INTRODUCTION TO THE STUDY OF THE  
**LAW OF**  
**THE CONSTITUTION**

**A. V. DICEY**



NINTH EDITION, REVISED BY  
**E. C. S. WADE, M.A., LL.D.**

## NINTH EDITION

Revised, and with an introduction by E. C. S. Wade, Downing Professor of The Laws of England, Cambridge University, and Fellow and Tutor of Gonville and Caius College, Cambridge.

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INTRODUCTION

TO THE STUDY OF THE

LAW OF THE CONSTITUTION



# INTRODUCTION

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# LAW OF THE CONSTITUTION

BY

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NINTH EDITION

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## PREFACE TO THE FIRST EDITION

THIS book is (as its title imports) an introduction to the study of the law of the constitution ; it does not pretend to be even a summary, much less a complete account of constitutional law. It deals only with two or three guiding principles which pervade the modern constitution of England. My object in publishing the work is to provide students with a manual which may impress these leading principles on their minds, and thus may enable them to study with benefit in Blackstone's *Commentaries* and other treatises of the like nature those legal topics which, taken together, make up the constitutional law of England. In furtherance of this design I have not only emphasised the doctrines (such, for example, as the sovereignty of Parliament) which are the foundation of the existing constitution, but have also constantly illustrated English constitutionalism by comparisons between it and the constitutionalism on the one hand of the United States, and on the other of the French Republic. Whether I have in any measure attained my object must be left to the judgment of my readers. It may perhaps be allowable to remind them that a book consisting of actually delivered lectures must, even though revised



for publication, exhibit the characteristics inseparable from oral exposition, and that a treatise on the principles of the law of the constitution differs in its scope and purpose, as well from a constitutional history of England as from works like Bagehot's incomparable *English Constitution*, which analyse the practical working of our complicated system of modern Parliamentary government.

If, however, I insist on the fact that my book has a special aim of its own, nothing is further from my intention than to underrate the debt which I owe to the labours of the lawyers and historians who have composed works on the English constitution. Not a page of my lectures could have been written without constant reference to writers such as Blackstone, Hallam, Hearn, Gardiner, or Freeman, whose books are in the hands of every student. To three of these authors in particular I am so deeply indebted that it is a duty no less than a pleasure to make special acknowledgment of the extent of my obligations. Professor Hearn's *Government of England* has taught me more than any other single work of the way in which the labours of lawyers established in early times the elementary principles which form the basis of the constitution. Mr. Gardiner's *History of England* has suggested to me the conclusion on which, confirmed as I found it to be by all the information I could collect about French administrative law, stress is frequently laid in the course of the following pages, that the views of the prerogative maintained by Crown lawyers under the Tudors and the Stuarts bear a marked resemblance to the legal and administrative ideas which at the present day under the

Third Republic still support the *droit administratif* of France. To my friend and colleague Mr. Freeman I owe a debt of a somewhat different nature. His *Growth of the English Constitution* has been to me a model (far easier to admire than to imitate) of the mode in which dry and even abstruse topics may be made the subject of effective and popular exposition. The clear statement which that work contains of the difference between our so-called "written law" and "our conventional constitution," originally led me to seek for an answer to the inquiry, what may be the true source whence constitutional understandings, which are not law, derive their binding power, whilst the equally vigorous statements contained in the same book of the aspect in which the growth of the constitution presents itself to an historian forced upon my attention the essential difference between the historical and the legal way of regarding our institutions, and compelled me to consider whether the habit of looking too exclusively at the steps by which the constitution has been developed does not prevent students from paying sufficient attention to the law of the constitution as it now actually exists. The possible weakness at any rate of the historical method as applied to the growth of institutions, is that it may induce men to think so much of the way in which a constitution has come to be what it is, that they cease to consider with sufficient care what it is that a constitution has become.

A. V. DICEY.



## PREFACE TO THE NINTH EDITION

IN each successive edition up to and including the seventh Professor Dicey amended the text so as to "embody any change in or affecting the Constitution" which had occurred in the twenty-three years which had elapsed since 1885. For it was the main features of the constitution of that year which Dicey set out to describe. When the time came in 1914<sup>1</sup> for a last edition by the author he thought it expedient to adopt a different course. This involved leaving the text in a form which achieved finality in 1908 and preceding it by an Introduction to serve two purposes: (1) to trace and comment on the effect upon the main principles of the constitution of changes of law or of the working of the constitution during the period between 1885 and 1914, as the author had expounded it; and (2) to state and analyse the main constitutional ideas which could in 1914 fairly be called new, either because they had come into existence or had begun to exert a new influence during that period. It is in this Introduction that Dicey argued against women's suffrage, proportional representation and imperial federation (the last-named with the dislike

<sup>1</sup> The eighth edition was published in 1915, but the Preface is dated in the previous year.



of one vehemently opposed to Home Rule).<sup>1</sup> The fourth new constitutional idea of the referendum found favour. The influence of Dicey lies in the principles stated in the body of the book, not in the arguments advanced in support of, or in opposition to new constitutional ideas which were not rules of law and were still matters of contemporary controversy. I have, therefore, after anxious consideration and consultation with colleagues decided to eliminate all reference to that part of the Introduction which dealt with the four constitutional ideas which Dicey discussed as new in 1914. The numerous notes in the Appendix upon special topics which were a feature of the last edition have also (with two exceptions) been omitted. For they were in the nature of supplements to his lectures, and in the main dealt with topics upon which the student of to-day has easy access to more adequate material in his textbooks. In their place I have attempted (1) to explain the nature of administrative law both in England and (with the aid of a French colleague) in France; (2) to give a short account of the liabilities of the State and its agencies in the ordinary courts; (3) to emphasise and to criticise in some detail the present position of the law of public meetings and the rules which restrict freedom of discussion. For it is apparent that it is in this sphere that the rule of the common law plays its most important part to-day in constitutional matters. The author's appendix on the Swiss Constitution has been retained in a revised form, because students have no ready means of access to literature in English upon this

<sup>1</sup> See Rait, *Memorials of Albert Venn Dicey* (1925), ch. viii.

interesting example of federal government. The note on the duty of soldiers in dealing with unlawful assemblies is also retained, as it can only be traced elsewhere in a White Paper.

I have attempted briefly to summarise in the Introduction to this edition the earlier part of the Introduction of 1914 which reflected the author's opinion of changes in the law and working of the constitution so far as these affected the main principles which he deduced. Accordingly I have set myself the task of writing a new Introduction dealing, on the lines of a comparison between 1885 (and to some extent 1914) and 1938, with the author's three principles—"first the legislative sovereignty of Parliament—secondly the universal rule or supremacy throughout the constitution of ordinary law—thirdly (though here we tread on more doubtful and speculative ground) the dependence in the last resort of the conventions upon the law of the constitution."<sup>1</sup>

By 1914 the author was convinced that the text would not gain from further editing, even at his hands. The text, therefore, as it appeared in 1908, and again unaltered in 1914, remains intact in this new edition, except that I have followed the author's practice of introducing a few references to new law in the footnotes. The book is a classic and I, for one, shrink from claiming to rewrite the constitution of 1938 upon the same lines. Moreover, I should regard any attempt to reproduce Dicey in modern guise as vandalism. The twentieth century has its own distinguished names in the field of constitutional law—Sir Maurice Gwyer and A. Berriedale Keith,

<sup>1</sup> 1st ed. (1885), p. 34; 8th ed. (1915), p. 34; 9th ed., p. 35, *post*.

the editors of Anson, *The Law and Custom of the Constitution*, the latter pre-eminent in the field of imperial public law, D. L. Keir and F. H. Lawson, the compilers of the well-known case book with its admirable introductory chapters on twelve aspects of constitutional law, and finally W. I. Jennings, whose *The Law and the Constitution* and *Cabinet Government* together with many other important contributions to public law have established his reputation as the leading exponent of his subject, and in particular as Dicey's most formidable critic. *The Law and the Constitution* contains some devastating criticisms of Dicey's reasoning. Dr. Jennings<sup>1</sup> argues that the three principles of the sovereignty of Parliament, the rule of ordinary law and the dependence of conventions upon law are based upon certain assumptions due to Dicey's adherence to the Whig tradition in politics. Certainly the rule of law, the doctrine upon which most reliance has been placed, assumes that the purpose of the constitution is to protect individual rights.

It is questionable whether any writer upon the subject of the constitution can entirely eliminate his own political predilections. Even if, as with Dicey, he endeavours to restrict his exposition to rules which he considers are directly or indirectly recognised by the courts, he must show the rules in what Dr. Jennings calls their ideological context, if the picture is accurately to reflect the truth. Here is to be found, at all events in part, the difficulty which

<sup>1</sup> See especially "In Praise of Dicey" in *Public Administration*, vol. xiii, 2 (1935), and *The Law and the Constitution* (2nd ed., 1938), *passim*.



any literal acceptance of the rule of law causes to-day. It is not that the protection of fundamental rights of the citizen with regard to personal liberty has ceased to be important. On the contrary the great political parties of to-day can at least agree that freedom of speech and freedom from arbitrary detention are essential characteristics of a democracy, and safeguards against authoritarianism. But in addition the State has become the means of providing services for the greater part of its subjects—not only services like the armed forces or the police designed to maintain order, but social services such as education, public health, housing, medical attendance, insurance against the risks of unemployment, old age, widowhood and orphanage, the relief of poverty (apart from insurance), the provision of ordinary conveniences like gas, water and electricity, and even in some cases of savings banks facilities.

The State too has established regulatory services which control the development of land and the road transport industry: it has taken power to acquire the coal resources from the owners of minerals, established a central organisation for the production of electricity, vested the passenger transport services of London in an independent board, restricted the profits paid to capital invested in certain public utility undertakings, expropriated the tithe owners and created a monopoly in broadcasting. The truth is that, as politicians always boast, the constitution has been evolving, and the emphasis which in 1885 as well as in 1914 Dicey placed upon his principles has changed. This change has been accelerated by the pace at which the sphere of modern governmental agencies

has developed. But his book rightly remains honoured and read by students of law, of political science and of history as well as by the practising politician. A book of this character cannot be edited upon the lines of a legal text-book. Its author's word stands for all time as his opinion with the text of which no edition by another hand should tamper.

Just as Dicey attempted no text-book of the constitution, so I have not endeavoured to complete the picture by elaborating the details of the modern constitutional machine, but have confined myself in the Introduction to reviewing in the light of the present those aspects of the constitution which Dicey used to illustrate his principles. It is not my object to defend Dicey against his critics here or on the Continent. Indeed it is generally conceded that his views on administrative law (*droit administratif*) both in England and in France have been responsible for a good deal of misunderstanding among Frenchmen and Englishmen of each other's systems, even at the time when they first appeared ; while the doctrine of legal supremacy of Parliament had hindered an appreciation in this country of the implications of Dominion status.

Reading and re-reading the text as I have done during the past twelve months, I prefer to emphasise my impression that much of what Dicey wrote is of value as well as interest to-day, though I have freely stated my reasons for disagreeing with some of his conclusions. To the historian who seeks to appreciate the outlook of a notable adherent of the Whig school of political thought in the later years of

Queen Victoria, the merit of the work needs no recommendation. The lawyer or the statesman who has first studied the constitution as it is to-day, can find in Dicey as perhaps nowhere else the emphasis on fundamental aspects of that constitution. over fifty years ago as it appeared to one who was a firm adherent to a particular school of political thought then current. If he doubts Dicey's interpretation of the sovereignty of Parliament and of the rule of law in the light of modern conditions, let him reflect that that great man has also given us at a later date *Law and Opinion in England in the Nineteenth Century* in which he foresaw, though with obvious reluctance, many of the trends of policy which have been accepted by modern Governments. Dicey has a further claim to fame in that his *Conflict of Laws*, his most substantial work, did much to establish on a firm footing the study of private international law, then in its infancy.

I have always felt that Dicey's reputation as a constitutional lawyer has suffered from the attempts by his successors to erect the constitutional ideas which he expounded into axiomatic principles which must abide for all time. But he himself writing in 1885 felt compelled "to consider whether the habit of looking too exclusively at the steps by which the constitution has been developed does not prevent students from paying sufficient attention to the law of the constitution as it now actually exists."<sup>1</sup> And he was conscious of the danger of the historical method as applied to the growth of institutions, lest it might induce men to consider with insufficient care what it is that an institution has become.

<sup>1</sup> Preface, 1st ed., p. vii, *ante*.



It is idle to speculate as to the extent to which Dicey might have changed his views, had he been writing of the constitution in 1938. My task is to summarise some of the modifications which he himself suggested as well as to discuss the application of his guiding principles under modern conditions. With the exception of the rule, "the Crown can do no wrong," no addition is suggested to these three principles. It is worth attention that Dicey's critics suggest no more. They are concerned to determine whether his principles are right or wrong rather than to suggest that there may be others. They are agreed, however doubtfully, that there is one fundamental principle—namely, that in the eyes of the law Parliament is supreme.<sup>1</sup> They recognise the value of his analysis of Cabinet conventions, though they cannot accept his reasons for their observance. But they reject, and I believe rightly, his conception of the rule of law and his views on the nature of *droit administratif*. Yet it is his conception of the rule of law which has influenced the development of public law in this country far more than his other principles.

The chief difficulty which I have found in writing the editorial introduction has been the realisation that in common with most contemporary students of the constitution I understand by administrative law something entirely different in scope from Dicey's conception. To Dicey it meant, and very definitely meant, only the principles which governed disputes between the State and its subjects as determined by courts other than regular courts applying the civil

<sup>1</sup> Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 63-64.

and criminal law (*contentieux administratif*). The view current to-day is that administrative law covers the whole field of public administration, its organs and their functions, both powers and duties. *Contentieux administratif*, or administrative jurisdiction, is but a small part of this field, though along with delegated legislation it has aroused the criticisms and the professional jealousies of lawyers to such an extent that the rest of the vast field of administrative activity has developed, until recently, virtually unheeded by the more conservative constitutional lawyers in this country. Some who have sought to plead for the recognition of administrative law have confined themselves to defending delegated legislative power and administrative jurisdiction. They have explained these powers as qualifications of the rule of law along with the immunities of the Crown as litigant. This was the approach dictated by the terms of reference of the Committee on Ministers' Powers, 1929-32. The doctrine of the separation of powers, limited though its application be to our constitution, was the cause, just as to it may be attributed Dicey's meanings of the rule of law. Other writers who plead for the recognition of administrative law do not seek to defend delegated legislation. They merely call attention to administrative powers and their effect on the common law.

The time has probably come for the problems of modern government to be approached with reference to functions rather than generalised principles. An examination of modern legislation shows that the parliamentary draftsman is not bound by any formula dictated by the separation of powers and does not

regard judicial control of administration as fundamental. The problems that confront him are too complex for solution by the application of theoretical formulae. His approach to his task seems to be determined by two considerations: (i) to give the best job to the best man; (ii) to devise means for supervising the exercise of discretion so conferred.<sup>1</sup> The result is a mass of enactments displaying a technique which is frankly based upon expediency and recognises the inadequacy of the common law and the methods of its judges to control what has been called by one recent writer the law of statutory discretions.

My thanks are due and are cordially rendered to those friends with whom I have discussed the difficulties inherent in the delicate task of writing a new introduction to a recognised masterpiece. Two such friends have been good enough to read both the Introduction and the Appendix in manuscript and to offer most helpful criticism and encouragement. I refrain from mentioning them by name lest they should feel barred by the convention which is thought by many to preclude reviews by persons whose help an author acknowledges in his preface. But I may warmly thank Professor René David of the University of Grenoble for writing the section on *droit administratif* which is printed in the Appendix. I hope that his contribution will convince those lawyers trained in the tradition of the rule of law who still harbour the fears and doubts about *droit administratif* to

<sup>1</sup> See "Three Approaches to Administrative Law," by J. Willis, *Toronto Law Journal*, vol. i (1935), pp. 53 *et seq.*

which Dicey gave expression. I would mention also Professor M. Battelli of the University of Geneva, and M. J. S. S. Brunschvig of the same University and of Trinity College, Cambridge, for their ready assistance with passages in the author's text and appendix relating to the Swiss Constitution.

To my friend and former pupil Mr. M. E. Bathurst, LL.B. (London), I am deeply indebted for his painstaking and, I believe, most accurate work upon the footnote references to the author's text as well as for the preparation of the index. Finally, Miss Kathleen Johnson, Secretary to the Master and Fellows of my College, has converted an illegible manuscript, oft rewritten, into typescript with patience and endurance which few could equal. Without her help I should not have completed within the time at my disposal this task, upon which, like many others, she has laboured in the past few years greatly to my assistance.

EMLYN C. S. WADE.

GONVILLE AND CAIUS COLLEGE,  
CAMBRIDGE, *August, 1938.*



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<sup>1</sup> Contributed by Professor René David.



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## ABBREVIATIONS

- K. & L.=Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933).
- J. & Y.=Jennings and Young, *Constitutional Laws of the British Empire* (1938).

TO

ARNOLD DUNCAN McNAIR

This Introduction and the Appendix are dedicated in  
grateful recognition by an old pupil.

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## INTRODUCTION

*General.*—Dicey's warning of the danger of not paying "sufficient attention to the law of the constitution as it now actually exists," which his study of Freeman's *Growth of the English Constitution* led him to utter, as he tells us in the Preface to the first edition of *The Law of the Constitution*,<sup>1</sup> is of even greater importance to-day. The constitution of 1938 is not the constitution of 1885. But so great has been the impression made by the latter work upon the study of public law during the past fifty years in Great Britain and to some extent upon the Continent and in America that, until comparatively lately, there has been an even greater danger of "looking too exclusively at the steps by which the constitution has been developed," thus paying insufficient attention to the present state of the law. The method of depicting the constitution in terms of principles rather than by description of its details is largely responsible for this. Dicey, moreover, was a master of exposition by the written word. He impresses the reader as one convinced of the truth of his assertions, which accordingly tend to be adopted by succeeding generations as axiomatic.

<sup>1</sup> 1st ed. (1885), Preface, pp. vii and viii; pp. v-vii, *ante*.

It has, however, long been apparent to those comparatively few persons who seek to make themselves familiar with all the details of the modern governmental machine that the principle of the rule of law, with its emphasis upon individual liberty, which seemed crystal clear to one nurtured in the Whig tradition of *laissez faire*, is difficult to reconcile with a state of affairs which the administrative activities of modern Governments seek to support and to augment. Rightly or wrongly (it is immaterial for this purpose) government is largely concerned with regulating individual liberty of action, a process which has been accelerated since 1914 throughout the world. Dicey himself recorded in the preface to the second edition of *Law and Opinion in England during the Nineteenth Century*, published in 1914, that "By 1900 the doctrine of *laissez faire*, in spite of the large element of truth which it contains, had more or less lost its hold upon the English people." He later saw with some misgivings the advent of national health insurance and legislation to regulate wages and conditions of employment in certain important industries. There is no need to detail a catalogue of the increase in the activities of the State during the twentieth century, whether in the form of providing public services or of restricting the free play of private enterprise. By 1938 it has become obvious that the cry is for more and more State regulation.

The House of Commons, so far from performing its former function of resisting the demands of the Crown for supply before redress of grievances, has become the scene of incessant demand from most quarters for public expenditure to remedy a social

or economic ill of the body politic. The State in 1932 abandoned after some eighty years the policy of free trade in favour of a measure of protection. Incidentally the change introduced a method of delegation of the taxing power which left only a veto to the House of Commons—a veto which it cannot exercise without defeating the Government. To achieve all this the legal doctrine of parliamentary supremacy has operated. No matter how fundamental the change, Parliament can alter the law, and the courts must accept it. But if the change has the effect of shifting the emphasis of the constitution from individual liberty to the provision of services for the general good, it may be necessary to examine not only the restrictions which the courts place upon the administration, but the whole field of administrative activity which Parliament has sanctioned, in order to test whether Dicey's denial of the existence of administrative law in England is valid to-day. The sphere of conventions increases as the field of constitutional law is recognised as extending beyond the Crown (in its exercise of the prerogative), Parliament and the courts. Nowadays conventions cover the whole field of governmental activity; they make workable a system of Government Departments which is still largely influenced by the older and narrower conceptions of the functions of the State. They preserve the unity of the British Commonwealth and thus ensure the maintenance of the *Pax Britannica*; for the Statute of Westminster—itself an attempt to put conventions into terms of law—is unintelligible as a document and in part inoperative, if it is regarded solely as an instrument



of statute law. All this raises doubts upon the reasons for obedience to conventions. Conventions between self-governing States cannot be explained as resting upon the sanction of the courts.

How then must the study of Dicey's guiding principles be approached to-day? There is a measure of confusion among teachers both of history and of law. The influence of the Whig tradition upon the teaching of history is but slowly declining. Lawyers, particularly academic lawyers, are by reason of their training schooled in the traditions of the common law, with its individualistic outlook, and learned in the historical growth of precedent. The common law offers no precedents for the problems of interrelation between subject and State which the Legislature calls upon the lawyer to face to-day. Even if the beneficent aid of equity be taken into consideration, it affords few remedies for the grievances of the subject against collective action by the State, save the clumsy procedural device of the prerogative writs for controlling excess of administrative zeal. These writs trace their origin back to the prerogative of the Crown exercised in favour of its own servants. They are now the chief means of restraining unauthorised activity by the same Crown which to-day personifies the State and many of its agencies.

For the lawyer, too, there is the need to venture into the field of political science, if he is to explain even those parts of the constitution which are laws in the strict sense in their proper setting. Dicey said <sup>1</sup> in relation to conventions of the constitution that the subject was not one of law, but of politics,

<sup>1</sup> P. 31, *post*.

and need trouble no lawyer or the class of any professor of law, but he was disposed to consider the limitation of the political sovereign upon the exercise of parliamentary supremacy, and he included the political code of conventions in his exposition of the constitution. To-day constitutional law and political science are divided by a line which it is difficult to distinguish. The modern collectivist State reflects in its legislation the political outlook of the times, just as Dicey may be regarded as reflecting one school of the political philosophy of his day. But even apart from this, how could one explain the Parliament Act, 1911, without reference to its political background ?

It is therefore necessary to be clear how to approach the study of the text. Three approaches are possible :

(1) To accept Dicey's guiding principles, in particular the Sovereignty of Parliament and the Rule of Law, as true only of the period in which he wrote.

(2) To regard the principles as only partially true of the nineteenth century (or even to deny their existence) and as inapplicable to any great extent to-day.

(3) To accept those principles as axiomatic and to endeavour to fit them to the changed outlook of modern public law.

The first is the easiest method, for it avoids the need for reconciling the present with the past. We may hazard the view that the historian of the future is more likely to favour the second of these outlooks, but the third has been, at all events until lately, the approach which has found most favour.

Students of law and politics whose interest in public law and government has first been aroused by studying *The Law of the Constitution* are prone to regard the author's principles as axiomatic despite some signs of misgivings shown by the author in his later editions. Still more true is this of the practitioner of law and the elder statesman holding public office. Among such are to be numbered many of the men who have held high judicial office in the past twenty years. This attitude is reflected in the terms of reference to the Committee on the Powers of Ministers appointed by the Lord Chancellor in 1929 "to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."<sup>1</sup> The Committee, it may be noted, contained a majority of lawyers and some leading public servants. It was appointed by a Lord Chancellor, Lord Sankey, who entered a Labour Cabinet straight from the Court of Appeal. The outbreak of criticism against governmental methods which preceded it was fostered by the Bar and Bench, led by the Lord Chief Justice, Lord Hewart. The agitation received some encouragement from Dicey's own University of Oxford, and the present holder of the Vinerian Chair was a member of the Committee. The critics had accepted as axiomatic the doctrine of the sovereignty of Parlia-

<sup>1</sup> Ministers' Powers Report (Cmd. 4060, 1932), p. 1.

ment and regarded the judges as the bulwark against interference with personal liberty and private property. Administrative discretion meant arbitrary power which Parliament had wrested from the King in Council in the seventeenth century. And this discretion was growing at an alarming rate. Acts of Parliament were used by Ministers as the means of delegating powers to themselves both to issue decrees having the force of law and to adjudicate disputes between subjects and authority. These opinions will be perfectly intelligible to readers of Dicey's text.

### (1) OUTLINE OF THE SUBJECT

It is important to realise the limits, which the author stated in his *Outline of the Subject*<sup>1</sup> as being imposed upon the functions of a professor of constitutional law, in order to appreciate his choice of the three guiding principles which he so fully elaborated in the subsequent pages.

Rules recognised by the courts in their application to the several parts of the constitution were his only direct concern; hence the doctrine of the supremacy of Parliament, a doctrine which is incontestable as a matter of law; hence also the rule of law under which the courts, applying the common law, protected individual liberty of action. The contention that conventions of the constitution depended in the last resort upon the courts is admitted to be doubtful and speculative. The long note on pages 26-27 reinforces this admission.

Two things strike the reader with some acquaint-

<sup>1</sup> Pp. 1-35, *post*.



ance of modern governmental organisation who peruses this outline :

(1) Dicey is only concerned with the organs which had attracted the sole attention of most writers on the constitution up to his day. Parliament; the Crown, with special regard to the prerogative in relation to Cabinet government; the High Court, with its duty to recognise the supremacy of Parliament and to administer the common law. With administration as such he is only concerned in a purely negative way to point out how the courts control excesses of administrative power.

(2) He does not attempt any examination of the actual working of the machinery of administrative government.

This may partly account for his almost complete disregard of modern statute law. But in view of his later *Law and Opinion*, in which he examines the trend of nineteenth-century legislation, it must have been a deliberate omission. It seems probable that he regarded administration as concerned with detailed function, and was unwilling to include it as part of constitutional law. This is borne out by his treatment of the Army and the Revenue. He merely touched upon these branches of the public services in order to show how they were subordinated to the law.

It was entirely in accordance with tradition to take a narrow view of constitutional law. Maitland was one of the first to plead for a wide view of the subject.<sup>1</sup> Dicey himself stated that the field had

<sup>1</sup> *Constitutional History of England* (written 1887-88) (1908), pp. 526-539.

not been fully mapped out.<sup>1</sup> Austin had regarded the subject as limited to a consideration of the organs exercising the sovereign power. It is now generally admitted that no branch of law has extended so widely, from the point of view of the student, as constitutional law. To-day even if the student accepts Dicey's own limitations, which he was himself forced to disregard in discussing the nature of conventions, and only considers legal rules which are to be found in the several parts of the constitution, he will necessarily include the law administered by the Government Departments, local authorities and independent statutory bodies like the Unemployment Assistance Board. He must study the mysteries of prohibition, certiorari and mandamus; of relator actions and actions for declarations. He is faced too with a study of Dominion status and colonial constitutional law. But the fuller the examination of the working of the governmental machine, as a whole, in contrast to what Maitland called "its showy parts," the more difficult becomes the acceptance of axiomatic principles. If, for example, Dicey had discussed the positive aspect of administration, he would have been forced to recognise that already in 1885 a great part of it was based upon Acts of Parliament which determined the position of the Crown and its servants, not to mention that of the already numerous statutory authorities and their officers. He could hardly have regarded this development as proceeding from the rights of individuals as defined and enforced by the courts, or have condemned the statutory powers which gave wide discretion to

<sup>1</sup> Pp. 33, 34, *post*.

public servants as being based upon arbitrary power in contrast to regular law.<sup>1</sup>

If we are to understand Dicey, these considerations must be borne in mind. They admittedly make the book more valuable to the historian of the nineteenth century than to the student of public law in 1938. But Dicey was writing for his own age. He did not at the outset intend to be definitive. He expressly warned his readers against "ceasing to consider with sufficient care what it is that an institution has become."<sup>2</sup>

We may now turn to a consideration of the three guiding principles formulated in the text, and review them in the light of the fifty-four years since their formulation by the author. This was the method pursued by him in 1914 when he left unaltered the text of the 1908 edition, embodying his views on recent developments in a long Introduction.

## (2) THE SOVEREIGNTY OF PARLIAMENT

*The Principle and its Application.*—The principle of parliamentary sovereignty was repeated by the author in each edition of this book up to 1914, when he emphasised that the truth of the doctrines had never been denied.

They were :

(1) Parliament has the right to make or unmake any law whatever.

(2) No person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

<sup>1</sup> See p. 202, *post*.

<sup>2</sup> Preface to 1st ed. (1885), p. viii; p. vii, *ante*.

(3) The right or power of Parliament extends to every part of the King's dominions.

In discussing the application at the present day of the doctrines involved in this principle it is well to remember that Dicey defined the duty of a professor of constitutional law as "neither to attack nor to defend the constitution but simply to explain its laws." As propositions of law it is as true to-day as in 1885 to say that Parliament has the right to make or unmake any law whatever and that no court can set aside the provisions of an Act of Parliament, but may merely interpret the meaning of an enactment. These are purely lawyer's conceptions, and the illustrations given in the text can be multiplied by reference to the Parliament Act, 1911, the Government of Ireland Act, 1920, the Irish Free State Agreement Act, 1922, and His Majesty's Declaration of Abdication Act, 1936. Nor can it be questioned that the provisions of an Act of Parliament are legally binding. But the fact that the courts cannot question the exercise of legislative power is not conclusive of the extent of that power.<sup>1</sup> For an excess of legislative power may be a matter between the legislature and the electors. As Dicey pointed out, neither in France nor in Belgium do the judges pronounce upon the constitutionality of enactments, despite the fact that those States possess formal constitutions of the rigid type.

Parliament hardly satisfied Austin as an example of a legal sovereign. Dicey introduced the political sovereign to explain Parliament's powers. Here he

<sup>1</sup> See Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 135, 136.

was exceeding his self-imposed limitation upon the functions of a constitutional lawyer. But sovereignty is historically a matter of political theory and cannot be derived from decisions of the courts.<sup>1</sup> Indeed Dicey does not cite any decision in support of his classic exposition of the sovereignty of Parliament. His jurisprudence is the Austinian theory of law as a command. But it is doubtful whether the British constitution does contain an illustration of a sovereign as the sole source of authority.

Where the purported sovereign is anyone but a single actual person, rules are required to ascertain the will of the sovereign. They must be observed as a condition of the validity of legislation. The rules are therefore logically superior to the sovereign. The King, Lords and Commons meeting as a single joint assembly cannot, even by a unanimous resolution, enact a single statute to which the courts would be bound to give effect.<sup>2</sup> Nor can the fundamental question, whether or not the sovereign can bind himself, be answered by a mere assertion of supremacy. In a federal constitution with its division of powers, or in one with fundamental provisions only capable of alteration by means more complicated than the ordinary process of legislation, clearly there will not be found in the legislature the sole source of ultimate authority. Dicey accepts the doctrine of legal supremacy whole-heartedly in its application

<sup>1</sup> See Jennings, "In Praise of Dicey," *Public Administration*, vol. xiii, 2 (1935), and the chapter (iv) on "In Parliament" in *Law and the Constitution* (2nd ed., 1938), pp. 139 *et seq.*

<sup>2</sup> See R. T. E. Latham, "The Law and the Commonwealth" in *Survey of British Commonwealth* (1937), vol. i, pp. 523, 524, and cf. pp. li-liii, *post*, for the contrary view.



to the King in Parliament of the United Kingdom. But it has caused difficulties in inter-Imperial relations. The suggestion that the United Kingdom Parliament could repeal the Statute of Westminster, 1931, as part of the law of a Dominion without that Dominion's request and consent (s. 4) is a result of the doctrine of the omnipotence of Parliament throughout the King's dominions. So too is the confusion as to the status of non-sovereign legislatures in Canada and Australia<sup>1</sup> which has been directly contradicted by decisions of the courts.

Dicey's method was to prove that certain alleged restrictions on the powers of Parliament did not exist. His account covers the subordination to Parliament of the King in Council, of resolutions of either House of Parliament, of the electorate whose legal right is restricted to choosing members of Parliament, and of the law courts, whose judicial legislation is subject to repeal by Parliament. He shows that there are no legal limitations based on moral law, on the prerogative or on preceding Acts of Parliament. A court of law can only apply the provisions of an Act of Parliament.<sup>2</sup> There is no disability in the English courts to interfere with the exercise of the legislative power as such, as witness the control over delegated legislation. But with an Act of Parliament interpretation of the intention of the legislature alone is relevant. There is merely a presumption, as a rule of interpretation, that, as far

<sup>1</sup> See pp. liii-lvi, *post*; cf. Jennings and Young, *Constitutional Laws of the British Empire* (1938), pp. 29-38.

<sup>2</sup> See *Lee v. Bude and Torrington Junction Railway Company* (1871) L.R. 6 C.P. 577, at p. 582, per Willes, J., and generally K. & L. pp. 1, 2.

as possible, in the absence of clear and unambiguous provision to the contrary, the common law, including the prerogative, remains intact.

Purely as a legal doctrine it is too late to question the supremacy of Parliament. We can merely note that historically the doctrine is comparatively recent, resulting from the alliance between the seventeenth-century common lawyers and Parliament; that it is not derived from any statute or formal constitutional enactment, but that it is supported, though not strictly proved, by case-law of the nineteenth century and that it has scarcely been questioned by the courts since the seventeenth.<sup>1</sup> There may be added to Dicey's proof of supremacy, as illustrated by the rule that one Parliament cannot bind its successors, modern examples of isolated attempts to lay down an immutable rule, *e.g.* Local Government Act, 1929, s. 135, which declares the intention of that Parliament as to future increases of expenditure. In *Vauxhall Estates v. Liverpool Corporation*<sup>2</sup> it was held that provisions contained in a later Act (Housing Act, 1925, s. 46) relating to compensation for land acquired compulsorily, repealed by implication the provisions of an earlier Act (Acquisition of Land (Assessment of Compensation) Act, 1919, s. 7 (i)) which attempted to invalidate subsequent legislation so far as it might be inconsistent; see also *Ellen Street Estates v. Minister of Health*.<sup>3</sup> The Indemnity Act, 1920, and the War Charges Validity

<sup>1</sup> See Schuyler, *Parliament and the British Empire* (1929), for an account of controversies within the Empire in which this legal right to legislate for the Colonial Empire has been denied.

<sup>2</sup> [1932] 1 K.B. 733.

<sup>3</sup> [1934] 1 K.B. 590.

Act, 1925, are further illustrations of the power of Parliament to legalise illegalities. The existence of this power denies supremacy to the courts.

The application of a rule of law may be limited by the facts. If the rule of parliamentary sovereignty simply expresses the relationship of the courts to Parliament as a legal conception,<sup>1</sup> it may be objected that legal sovereignty is not sovereignty as such, but merely a lawyer's rule which is accepted and acted upon because it suits political conditions in a State that the unrestricted power of law-making should rest in Parliament alone. Dicey appreciated Austin's difficulty in finding the sovereign in King, Lords and Commons, but he rightly rejected the Austinian explanation that members of the Commons are trustees for the electors, whom Austin regarded as being able in the long run to impose their will. No such trusteeship is recognised by the courts, nor in the nature of things could be established as a matter of law.

Recent events have shown that the limitation of the legal rule in fact goes further than Dicey would have admitted. He described <sup>2</sup> the external limit to the real power of a sovereign as consisting in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws. His examples are chiefly concerned with the actions of despotic monarchs. As a prophet he has been unhappy in his predictions of resistance to Parliament. For it has without resistance both changed the succession to the throne by His Majesty's Declaration of Abdication Act, 1936, and on more than

<sup>1</sup> See p. 72, *post*.

<sup>2</sup> See pp. 76-79, *post*.

one occasion prolonged the life of the existing House of Commons.<sup>1</sup> Granted that political expediency may be a *de facto* limitation upon the working of a legal rule, it must be admitted that the question of where lies sovereignty as a political concept remains unanswered, except that the power of government rests in the last resort in the result of a general election. Nor need it be answered by a lawyer.

*Internal Limitations upon Legal Supremacy.*—There is in the sphere of internal government a limitation upon the supremacy of Parliament which was hardly recognisable in 1885. The presence in the State of organisations reflecting the views of every trade, profession or business has led to the practice of consultation prior to the introduction of a measure into Parliament between the Government Department whose task it may be to present a Bill to Parliament and the organisations whose members are most concerned with the contents of the proposed legislation. The result is that Parliament may be asked by the Government to enact what is more or less an agreed measure. Some striking evidence as to the extent of this practice was given by the Ministry of Health to the Committee on Ministers' Powers.<sup>2</sup> Governments can no longer afford to disregard organised public opinion. The exercise of the law-making power by Parliament is controlled almost exclusively by the Government of the day, placed in power by the possession of a majority in

<sup>1</sup> The Parliament elected in December, 1910, was dissolved in 1918, having four times renewed its own existence which was limited to 5 years by its own enactment, the Parliament Act, 1911.

<sup>2</sup> See Ministers' Powers Report (Cmd. 4060, 1932), vol. ii, Minutes of Evidence, p. 120.

the Commons. But it is only used to coerce the subject after the subjects—through Chambers of Commerce, Federations of Industry, Trade Unions (of manufacturers as well as of employees), professional, technical and manual—have been consulted.

Rule by advisory committees is a device much favoured since 1918. This gives the force of law to the obligation to consult beforehand, where, as is often the case, such advisory committees are expressly provided by statute. In the sphere of taxation the Import Duties Advisory Committee was set up by the Import Duties Act in 1932. The recommendation of this committee, a body virtually independent of parliamentary and ministerial control, is a condition precedent to an alteration by Treasury Order approved by the House of Commons of the tariff rates for general customs duties. The Consultative Committee of the Board of Education and the Unemployment Insurance Statutory Committee of the Ministry of Labour are important instances of this practice. The Minister of Transport is required by law to consult a Rates Advisory Committee and is also advised by Road, Transport, Tramways and Electricity Committees. The Police Council must be consulted before the Home Secretary exercises his power of making regulations as to the government, mutual aid, pay, allowances, pensions, clothing expenses and conditions of members of the police forces.<sup>1</sup> Nor must the close co-operation between the Ministry of Health and local authorities,

<sup>1</sup> As to the Ministry of Agriculture see Jennings, *Cabinet Government* (1936), pp. 76-78.



acting either directly or through their various associations or those of their officers, be overlooked.

The result is that before the sovereignty of Parliament is invoked to make or unmake laws the normal process, at all events as regards internal administrative organisation, is for the Minister either by obligation of law or on grounds of expediency to seek advice from the appropriate advisory committee. He may also take into consultation as many other bodies of a representative character as he chooses. When the resulting Bill comes before Parliament which alone can give it the force of law, it may well be, except in details, an agreed measure which those most affected are prepared, however reluctantly, to put into operation. Delegated legislation too has weakened the control of Parliament, though without it Parliament could not have enlarged the sphere of administration. This type of legislation is not confined to Government Departments, but extends also to the numerous independent statutory authorities which cannot be regarded as Departments of State directly responsible to the legislature; the Unemployment Assistance Board and the Agricultural Marketing Boards will suffice as illustrations.

Thus the political supremacy of Parliament as a law-making organ becomes more and more a fiction. Legislation is a compromise of conflicting interests. Parliament can no longer compel, save in outward form. It must be left to the political scientist to say, if he can, where lies the political sovereign. This much is clear, that truly representative government can but imperfectly be achieved by a legislature acting alone. Other methods are essential to produce

coincidence between the organ exercising legal power and the subject.

It may be well to add that a convention which secures consultation before framing legislation does not involve a Government accepting dictation upon major matters of policy. It would be a dangerous doctrine to admit, for example, control of the foreign policy of the State by the refusal of members of an important trade union to make munitions of war. Consultation of private interests by Government Departments is in practice directed to matters of detail in framing legislation rather than to the determination of fundamental issues of policy.

*The Statute of Westminster.*—The legal rule of parliamentary sovereignty is capable of raising far-reaching political issues upon the interpretation of the Statute of Westminster, 1931.<sup>1</sup> One main provision (s. 2) of the Statute was necessitated by the need for repealing the Colonial Laws Validity Act, 1865, in its application to the Dominions. This enactment, in that it extended to every colony, was itself an illustration of the working of a legal rule which had been in practice largely, but by no means entirely, abrogated by the convention of non-interference by the United Kingdom Government and Parliament in the affairs of those colonies which had become Dominions for some sixty years past.<sup>2</sup> There remained in force a number of Acts of Parliament which operated throughout the Empire, and these restricted

<sup>1</sup> For text of Statute of Westminster see App. sec. vi.

<sup>2</sup> See, however, *Nadan v. The King* [1926] A.C. 482; K. & L. 437. One of the grounds for declaring void the provisions of a Dominion statute was its repugnancy to the Imperial Acts of 1833 and 1844 constituting the Judicial Committee of the Privy Council.

the competence of the Parliaments of the Dominions to legislate upon certain topics. The Judicial Committee Acts, 1833 and 1844, are the most important examples in the constitutional sphere.

The rule of legal supremacy of the United Kingdom Parliament raises doubts upon s. 4 of the Statute of Westminster whereby "no Act of Parliament of the United Kingdom passed after the enactment of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof." It may be accepted that Dicey's external limitation upon the exercise of parliamentary supremacy would prevent any re-enactment by Parliament of the Colonial Laws Validity Act. But it is more important to observe that the preamble of the Statute of Westminster sets out in express language two important conventions and that they were treated as binding in connection with the abdication of King Edward VIII, notwithstanding the rule which confines the operative parts of a statute to its actual sections.

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom :

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

The Prime Minister of the United Kingdom consulted the Premiers of the Dominions upon the King's proposal of a morganatic marriage. Marriage in the full sense would have involved legislation, according to established constitutional practice, by all the Parliaments of the British Commonwealth, since it was proposed to bar prospective issue from the line of succession. Upon this there was no consultation between Mr. Baldwin and his Dominion colleagues. The former, however, warned King Edward that legislation by the Dominion Parliaments would be necessary. At a later stage the assent of the Dominions was sought to the introduction of the Bill to effect the abdication. This also accorded with constitutional practice. There is nothing in the preamble to indicate that the assent of the Dominion Parliaments should be expressed in a statute of the United Kingdom Parliament. And South Africa and the Irish Free State preferred to legislate independently of Westminster. Thus the Bill was enacted in accordance with the provisions of s. 4 only in the case of Canada, whose Government alone "requested and assented." The Irish Free State enacted its own legislation. The Commonwealth of Australia and New Zealand had not adopted the section and so merely assented in accordance with the "established constitutional position." South Africa also only assented. Section 4 of the

Statute of Westminster had already been modified in its application to the Union by s. 2 of the Status of the Union Act, 1934.<sup>1</sup> The Abdication required a separate enactment by the Union Parliament to make the amendment of the Royal Marriages Act, 1772, part of the law of the Union.<sup>2</sup> The Union Government took the view that there had been an abdication by the King and took the opportunity in this enactment of dating it from the day before the Act of the Parliament at Westminster.

The answer to the question, can Parliament ever repeal s. 4 of the Statute of Westminster, is not easy. Purely as a matter of political expediency it is unlikely to attempt the task. Strictly as a matter of law the Statute would appear to have the same effect as any other Act of Parliament and to be capable of repeal or amendment by Parliament. It is a feature of constitutions of the enacted type, particularly those in force in the British Commonwealth of Nations, that there are implicit in the constitution a number of conventions. For example, with one exception (Eire), the doctrine of ministerial responsibility has never been enacted in the constitution of any of the Dominions, including the two Federal Dominions of Canada and Australia.<sup>3</sup> Cabinet government thus rests as much upon convention as it does in the United Kingdom, except that the

<sup>1</sup> See pp. li, lii, *post*.

<sup>2</sup> For the Dominions and the Abdication see especially Wheare, *The Statute of Westminster and Dominion Status* (1938), ch. xii; K. H. Bailey, articles on "The Abdication Legislation in the United Kingdom and in the Dominions": in *Politica*, vol. iii (1938), Nos. 11 and 12.

<sup>3</sup> This is not true of some of the Australian States whose constitutions are contained in Acts of the State legislatures.



institution which performs Cabinet functions may be provided in the Constitution Act, *e.g.* the Federal Executive Council, to advise the Governor-General of the Commonwealth of Australia. The apparently rigid separation of powers which is the chief feature of the constitution of the United States breaks down in many particulars if account be taken of the influence of conventions which find no place in the constitution. Thus even in the matter of the Presidential election the present method has been evolved by convention and is very different from that intended by the makers of the original constitution. If then the Statute of Westminster be regarded as a document equivalent to a constitutional charter so far as the grant of legislative autonomy to the Dominions is concerned, there may be read into s. 4 the established convention of non-interference which is implicit in the recitals of the preamble by the references to "free association" and "the established constitutional position."

It is to be observed that the Statute of Westminster does not say that Parliament shall not legislate for the Dominions. On the contrary, s. 7 (1), by saving the power of amendment of the British North America Acts, 1867-1930, and s. 9 (2), which relates to legislation affecting the Australian States, show that legislation by the Parliament of the United Kingdom is contemplated in two cases. In the latter sub-section there is express reference to existing constitutional practice in relation to legislation by the Parliament of the United Kingdom with respect to matters within the authority of the States, which thus receives recognition as a matter of strict law.

The action taken after the enactment of the Statute of Westminster by the Parliament of the Union of South Africa shows how difficulties may be raised by the doctrine of legal supremacy. Section 4 of the Statute of Westminster, like the other sections of general application, has been incorporated into the law of the Union by the Status of the Union Act, 1934. Section 2 of that Act enacts that—

The Parliament of the Union shall be the sovereign legislative power in and over the Union; and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December 1931 shall extend, or be deemed to extend, to the Union as part of the law of the Union, *unless extended thereto by an Act of the Parliament of the Union.*

These last words go further than s. 4 of the Statute of Westminster. For that section merely stipulates for the express declaration in the United Kingdom Act of the request and consent of the Dominion. Can the words of s. 2 be construed as defining the mode of application of s. 4 of the Statute to the Union? There seems no reason why request and consent should not be given in this way as well as by express declaration in a United Kingdom Act intended to extend to the Union. But this view would seem to involve the prior or simultaneous enactment in South Africa of the contents of a proposed Act of the United Kingdom legislature. This would be awkward in practice and can scarcely have been intended.

Another view is that the Union Act has amended s. 4 of the Statute of Westminster. This conflicts

directly with the legal supremacy of the Parliament of the United Kingdom, which cannot be taken to have qualified its legal rights under s. 4 of the Statute through the agency of the Union Parliament. The latter body has power to amend existing or future Acts of the United Kingdom so far as they are part of the law of the Dominion; Statute of Westminster, s. 2. Upon this would seem to rest the claim to modify the Act which gave it this power. It has declared itself to be sovereign in its own sphere, thus denying the supremacy of the Parliament of the United Kingdom. It is somewhat curious that so far the step, which would seem to follow logically, of enacting the Union of South Africa Act, 1909, as a law of the Union has not been taken. There are thus two competitors for legal supremacy in the Union. Can it be doubted that the claim of the Union must prevail, as it must if the view that s. 4 of the Statute of Westminster is qualified by the constitutional convention of non-interference be accepted? <sup>1</sup>

*Sovereignty of the Parliament of the Union of South Africa.*—In *Ndlwana v. Hofmeyr, N.O.*,<sup>2</sup> the Supreme Court of the Union of South Africa decided that with the repeal of the Colonial Laws Validity Act<sup>3</sup> the Parliament of the Union had become a sovereign legislature of the same kind as the Parliament of the United Kingdom. The court declined to question the validity of an Act of the Union Parliament on the ground that its enactment was *ultra vires* the

<sup>1</sup> See generally for this subject, Jennings and Young, *Constitutional Laws of the British Empire* (1938), pp. 103 *et seq.*, esp. pp. 110-112.

<sup>2</sup> (1937) A.D. 229; J.C.L. Ser. III, xix. 271.

<sup>3</sup> See p. ci and pp. 105-107, *post*.

Union of South Africa Act, 1909. This Act of the United Kingdom Parliament, enacting the Union constitution, contains what are known as "entrenched" clauses. By s. 152 it is provided that certain sections, including s. 35 which relates to qualifications for voters, shall not be repealed or amended except by a joint sitting of both Houses of the Union Parliament and by a two-thirds majority of the total number of members of both Houses approving the third reading. The Native Franchise Bill, 1936, was so approved, but the appellant argued that it was not a law which fell within this entrenched section and therefore was not validly enacted by the procedure prescribed for the entrenched clauses.

The court refused to regard the procedure of s. 152 as binding and held that the legislature could pass any measures by joint or separate sessions at their option. Provided that the Bill received the royal assent, it was binding on the courts, who would accept a King's Printer's copy as conclusive evidence. By s. 2 of the Status of the Union Act, 1934, the Parliament of the Union had been declared to be the sovereign legislative power in and over the Union, and only bound by enactments of the Parliament of the United Kingdom passed *subsequent* to the Statute of Westminster if they were extended to the Union by Act of the Union Parliament. But s. 2 did not refer to pre-Statute of Westminster enactments extending to South Africa, nor has the Union of South Africa Act been re-enacted by the Union Parliament.

The effect of this decision by the Supreme Court of the Union is thus to treat the Union Parliament,

which is clearly a non-sovereign legislature in Dicey's classification, as sovereign for the purpose of the validity of all its enactments, which accordingly cannot be questioned in any court.

If the legal supremacy of Parliament has caused somewhat academic difficulties in the sphere of relations with the other members of the British Commonwealth, conventions, based, unlike the so-called conventions of Cabinet government, upon express consent reached at Imperial Conferences, have continued to develop the idea of Dominion status. Examples of this may be found in the appointment of Governors-General on the advice of the Prime Minister of the Dominion concerned, and in the exercise of treaty-making powers by a Dominion independently of the British Foreign Office.<sup>1</sup> The growth of Dominion autonomy was indeed recognised by Dicey. The Statute of Westminster is the only legal document, in the lawyer's sense of the term, which governs inter-Imperial relations.

*Non-Sovereign Legislatures.*—The acceptance of the doctrine of the supremacy of the United Kingdom Parliament has led to confusion as to the legal status of the so-called non-sovereign legislatures, such as those of the federal constitutions of Canada and Australia or the unitary constitution of New Zealand. They were likened by Dicey in his analysis to statutory corporations, such as railway companies and local authorities.<sup>2</sup> Such legislatures are, however, habitually given power to legislate for the "peace, order and good government" of their State, be it Colony or Dominion. These words give full power

<sup>1</sup> See pp. cv et seq., post.

<sup>2</sup> See pp. 92 et seq., post.



of legislation to the local legislature, and no court may declare a statute invalid as being unnecessary or as containing, for example, provisions which a court might regard as contrary to good order. Such a power is subject only to any limitations contained in the Constitution Act itself. It is fully competent for a legislature of a self-governing State in the British Empire to enact what laws it chooses, including the delegation of its law-making powers to subordinate authorities.<sup>1</sup> It may not, however, abdicate its functions, except by an express power of constitutional amendment. It is otherwise with a local authority, such as the London County Council, or a railway company possessed of power to enact by-laws, with which Dicey compared the legislatures of the Dominions and the Provincial Parliaments of Canada as well as those of the States and the Federal Legislature in the United States of America. For local authorities may not enact by-laws which are unreasonable and oppressive,<sup>2</sup> nor delegate their law-making powers without express statutory authority. Because no court can deny the validity of an Act of Parliament, according to the accepted doctrine of English law, it does not follow that other legislatures, the validity of whose enactments is open to review by the courts, are not equally supreme in their own sphere and able to enact the same kind of legislation as the United Kingdom Parliament. The difference lies in the fact that the powers of the latter body have not been defined, whereas the

<sup>1</sup> See Jennings and Young, *op. cit.*, cases cited in note 6, pp. 30, 31.

<sup>2</sup> *Kruse v. Johnson* [1898] 2 Q.B. 91; K. & L. 26. Corporate bodies of a private character may not enact by-laws which are unreasonable, even if not oppressive.

powers of a Dominion or Colonial legislature are set out in the constitution ; but they are plenary powers, subject only to express reservations or limitations which are binding, unless they are capable of alteration by the prescribed form of constitutional amendment.<sup>1</sup> In the United Kingdom no distinction can be drawn between constitutional and ordinary legislation, for the power of Parliament to legislate is not limited in any way by legal restriction. The powers of a Colonial legislature are limited by the constitution itself and by the Colonial Laws Validity Act, 1865. The latter enactment has been repealed in its application to the Dominions by the Statute of Westminster.<sup>2</sup> It had previously been rendered almost a dead letter in this sphere by the operation of the convention of non-interference by the United Kingdom Parliament, which had long declined to pass legislation for the Dominions, except at their own request. Such a legislature is, then, if the phrase made sense, sovereign within its powers, and cannot be restrained by the courts from enacting whatever legislation it chooses for the peace, order and good government of the Dominion or Colony.

Thus in *Hodge v. The Queen*<sup>3</sup> the question arose whether the legislature of Ontario had or had not the power of entrusting to a board of commissioners the power of enacting regulations with respect to the

<sup>1</sup> Cf. *Attorney-General for New South Wales v. Trethowan* [1932] A.C. 526 ; J. & Y. 59, where it was held that a Bill to abolish the Legislative Council of the State could not be presented for the Governor's assent as it had not been passed in the manner prescribed by a colonial Act which required the approval of the electorate to be given to such a measure.

<sup>2</sup> See App. s. vi.

<sup>3</sup> (1883) 9 App. Cas. 117 ; J. & Y. 49.

local Liquor Licence Act, 1877, of creating offences for breach of those regulations and annexing penalties thereto. It was held by the Judicial Committee of the Privy Council that there was such a power. Provincial legislatures are in no sense delegates of, or acting under any mandate from, the Imperial Parliament, under the British North America Act, 1867. That Act created a legislative assembly for Ontario with exclusive authority to make laws for the Province in relation to certain enumerated topics. It conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but gave authority as plenary and as ample, within the limits prescribed for provincial as opposed to federal legislation, as the Imperial Parliament in the plenitude of its power possessed or could bestow.<sup>1</sup> There is thus no comparison as a matter of law between the powers of such a legislature and those of (say) the London Midland and Scottish Railway Company to enact by-laws on special topics; the company has not in law any authority to act as a legislature for the good government generally of its property, but is strictly a delegate exercising its power of making by-laws by delegation from Parliament.

*Parliamentary Sovereignty and Federalism.*—The habitual exercise of supreme legislative authority by one central power—the Parliament of the United Kingdom—which in its turn is more and more subordinated to the will of the Administration, or Executive Government, for the time being, suggests

<sup>1</sup> See also *The Queen v. Burah* (1878) 3 App. Cas. 889; J. & Y. 45; *Powell v. Apollo Candle Company Ltd.* (1885) 10 App. Cas. 282; J. & Y. 48.

that this legal supremacy is capable of use to effect changes of a revolutionary character by those whom the electorate has placed in power. In particular it appears that the advent by constitutional means of the totalitarian State can be more readily achieved by a Parliament which has power to destroy as well as to create the whole framework of government by a simple Act or series of Acts. It is obvious that, if a majority in the House of Commons can do what it likes with our liberties, we should be safer with a written constitution. For liberty of the individual is nothing more than the residue of his conduct which remains unfettered by any law. Equally it is true that the ills of the body politic can be cured by ordinary legislation in the United Kingdom with greater facility than is possible under most enacted forms of constitution which normally limit the powers of the legislature, and invariably do so, in a federal State.

The essential characteristic of federalism is "the distribution of limited executive, legislative and judicial authority among bodies which are co-ordinate with and independent of each other." The supremacy of the constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distri-

of legislation by Parliament. The recent Canadian programme of social legislation was extremely moderate compared with the development of social services which has long since been attained in the United Kingdom. Yet it was destroyed as encroaching upon the spheres reserved to the federating Provinces by the British North America Act, 1867, in a series of judgments which (*inter alia*) denied to Canada as an independent member of the family of nations a power which she could enjoy as a unit of the Commonwealth. This result followed because s. 132 of the British North America Act, 1867, gave the Parliament of Canada power to legislate in order to implement treaties concluded by the Crown for Canada as a part of the British Empire on the advice of the Cabinet of the United Kingdom. The Act did not provide for a similar power to legislate in cases where the King was advised seventy years later as to the exercise of the treaty-making power by his Canadian Ministers to ratify an international convention for Canada in her new status as an international juristic person. The delegation of the treaty-making power to a colonial Government was not in contemplation in 1867. It was an accomplished fact of some ten years standing when the Judicial Committee of the Privy Council was called upon to decide upon the constitutionality of the Weekly Rest in Industrial Undertakings Act, 1935, and the Minimum Wages Act, 1935, in the *Attorney-General for Canada v. Attorney-General for Ontario*.<sup>1</sup> The distribution of legislative power between the Dominion and the Provinces is based upon classes

<sup>1</sup> [1937] A.C. 326.



of subjects. "Property and civil rights" in a Province are assigned by the constitution to the Provincial legislatures. Save by the method of constitutional amendment, no further legislative competence can be obtained by the Dominion from its accession to international status despite the consequential increase in its executive functions. Canada is fully equipped to legislate upon every topic, including the performance of treaty obligations, but the legislative powers remain distributed. It is only by co-operation between the Dominion and the Provinces that real progress can be made in any topic of legislation, which though falling within the ambit of the Provinces is considered ripe for action by the Dominion as a whole.

This one example, taken from a series of cases which with two exceptions were decided against the validity of the New Deal legislation in the Dominion of Canada,<sup>1</sup> suffices to show that in a federal constitution (1) it is difficult to adapt the constitution to changing political conditions: (2) the federal administration is not free to adopt a policy of centralisation, no matter how urgent may be the demand for national, as opposed to provincial, action, save only within the boundaries of a constitution which in practice is apt to be unalterable: (3) unless the member States are willing to abandon their sphere of legislative competence, no federal State in the enjoyment of a parliamentary form of government can by constitutional means achieve that concentration of power which is essential to the totalitarian State.

<sup>1</sup> See *Canadian Bar Review*, vol. xv (1937), No. 6, for a series of critical articles upon these decisions.

That it can be achieved in other circumstances is evident from the evolution of the Soviet Union of Russian Republics, which remains after twenty years definitely a dictatorship.

It may then be argued that the federal State constitutes a bulwark against dictatorship, and in particular dictatorship of the Fascist character. In every federal State there exists a dual bureaucracy, but it is a bureaucracy which is controlled by the constitution. One part cannot enlarge its powers at the expense of the other. Judicial interpretation may swing the balance in favour of federal or State government, but a drastic increase of power one way or the other is unattainable. On the other hand, it may be difficult in such circumstances to achieve that new conception of liberty which is regarded as essential in modern civilisation. For liberty to-day involves the ordering of social and economic conditions by governmental authority, even in those countries where political, if not economic, equality of its citizens has been attained. Without expansion of that authority, which the United States as well as the Dominion of Canada and the Commonwealth of Australia have so far found more difficult to achieve than has a unitary State like the United Kingdom, there is inevitably a risk that the constitution may break down before a force which is not limited by considerations of constitutional niceties. For the diffusion of political power, such as prevails in those great English-speaking communities, seems to call insistently for the equalising of economic conditions, such as has proceeded gradually in Great Britain during the past thirty

years and more. Is it too optimistic to predict that those comparatively new States, with their freer conceptions of social and economic equality, may achieve those guarantees of individual happiness without enduring the sufferings which a dictatorship, however idealistic, must inflict upon individuals?

Dicey was concerned to show that under a federal, as under a unitarian, system there existed a legal sovereign power, difficult though that sovereign was to discover and still more difficult to rouse to action. The comparison which he sought to make was between the Parliament of the United Kingdom and the sovereign power in the United States with its complicated machinery for constitutional amendment. But the rigidity of a constitution may equally be a feature of a unitary State. The real ground of contrast is between a State where the constitution may be altered by simple enactment of the legislature and one where special machinery has to be evoked to effect such a change. In the former case the political sovereign is more powerful. For it can, by determining the political character of the Administration for the time being, ensure that radical changes are brought about by a simple act of the legislature. Under the latter type of constitution, particularly in a federation of States, any attempt at amendment must necessarily raise the issue of constitutionality in the courts.

*Dicey's Views on the Parliament Act.*—In the Introduction of 1914 Dicey discussed (1) the effect of the Parliament Act, 1911, and (2) the relation of the Imperial Parliament to the Dominions upon the principle of the sovereignty of Parliament.

That the Parliament Act, 1911,<sup>1</sup> might have effected a change in the constitution of the body possessed of sovereign power was apparent. The effects of the Act may be summarised in Dicey's words :<sup>2</sup>

(1) In respect of any Money Bill the Act takes away all legislative power from the House of Lords. The House may discuss such a Bill for a calendar month, but cannot otherwise prevent, beyond a month, the Bill becoming an Act of Parliament.

(2) In respect of any public Bill (which is not a Money Bill)<sup>3</sup> the Act takes away from the House of Lords any *final* veto, but leaves or gives to the House a *suspensive* veto.

This suspensive veto is secured to the House of Lords because under the Parliament Act, s. 2, no such Bill can be passed without the consent of the House which has not fulfilled the following four conditions :

- (i) That the Bill shall, before it is presented to the King for his assent, be passed by the House of Commons and be rejected by the House of Lords in each of *three successive sessions*.
- (ii) That the Bill shall be sent up to the House of Lords at least one calendar month before the end of each of these sessions.
- (iii) That in respect of such Bill at least two years shall have elapsed between the date of the second reading of the Bill in the House of Commons during the first of those sessions and the date on which it passes the House of Commons in the third of such sessions.
- (iv) That the Bill presented to the King for his assent shall be in every material respect identical with the Bill sent up to the House of Lords in the first of the three successive sessions except in so far as it

<sup>1</sup> For text see App. sec. vi.

<sup>2</sup> See 8th ed. (1915), pp. xxi-xxiii.

<sup>3</sup> Or a Bill to extend the duration of a sitting Parliament.

may have been amended by or with the consent of the House of Lords.

(3) The House of Commons can without the consent of the House of Lords present to the King for his assent any Bill whatever which has complied with the provisions of the Parliament Act, s. 2, or rather which is certified by the Speaker of the House of Commons in the way provided by the Act to have complied with the conditions of the Parliament Act, s. 2.

His conclusion was that sovereignty still resided in the King and the two Houses of Parliament, but that the Act had greatly increased the share of sovereignty possessed by the House of Commons.<sup>1</sup> Comparison may be made with Lord Esher's opinion<sup>2</sup> (1910):

It [the Bill] does not strike a deadly blow at the influence of the House itself, or the influence wielded by its individual members. It undoubtedly does curtail the powers of the House after a fashion not dissimilar from that by which the power of the Crown has from time to time in the history of the nation been curtailed; yet it would be difficult to assert that the influence of the Crown is not as great to-day as it has been in any period in our history.

If there is anything in this analogy, it might quite conceivably happen that the influence of the House of Lords, so far from being diminished, might be increased when it is found that its powers which at present excite jealousy in the minds of a great number of people have been brought into greater accord with what are called democratic ideas.

*Dicey's Views on the Imperial Parliament and the Dominions.*—As to the extent of the exercise of sovereignty since 1885 the periodic conferences in

<sup>1</sup> For consideration of the effect of the Parliament Act at the present day, see Intro. pp. cxxix-cxxxvi, *post*.

<sup>2</sup> *Journals and Letters*, vol. iii, 1938, p. 31.

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London of Prime Ministers of the Self-Governing Colonies, developing into the Imperial Conferences in 1907, and the substitution of the title Dominions for Colonies by countries who were members of the Conference, necessitated consideration as to whether the Imperial Parliament had not "ceased as a rule to exercise supreme legislative power in certain countries subject to the authority of the King." Even before 1885 colonial history might well have raised doubts in a generation which in twenty years or so saw the extension of cabinet government to many of the Queen's Dominions and the formation of a Federal State in Canada. Dicey concluded that in 1914 "the self-government *e.g.* of New Zealand meant absolute unfettered, complete autonomy, without consulting English ideas of expediency or even of moral duty. . . . The independence of the Dominion, in short, means nowadays as much of independence as is compatible with each Dominion remaining part of the Empire." We must examine later in detail what more this independence involves in 1938.<sup>1</sup>

In the altered relationship between the United Kingdom and the Dominions Dicey saw "the admirable fruit" of the old policy of *laissez faire*. He regarded the South African War as a war to prevent secession and as marking an end to the nineteenth-century indifference to secession from the Empire. But he doubted the possibility of equal citizenship of all British subjects which has since been achieved by the British Nationality and Status of Aliens Acts, 1914-33, which the Dominions (Eire alone and partially excepted) have adopted.

<sup>1</sup> See Intro. pp. xcix *et seq.*, *post*.

## (3) THE RULE OF LAW

*The Principle; what it means.*—The supremacy of the law of the land was not a novel doctrine in the nineteenth century. It may be traced back to the mediaeval notion that law, whether it be law ordained by God or by man, ought to rule the world.<sup>1</sup> To-day this notion is reflected in the oft-repeated appeal of statesmen for the restoration of the rule of law in international affairs. By this is meant the recognition of certain fundamental obligations as binding upon nations in their dealings with one another. The tragedy to-day is not the absence of international law, but the fact that there are some members of the family of nations who are prepared to rely on force rather than on the accepted methods of international law for the settlement of their disputes. Any reign of law may be reduced to anarchy by a lawless minority.

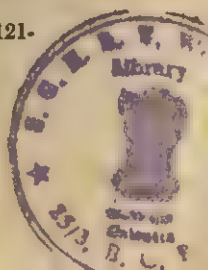
So far as the rule of law means law and order all civilised States recognise its existence within their boundaries. It may be achieved by a dictatorship as well as by a parliamentary or other liberal form of government. Had the Stuart claim to rule by prerogative prevailed, England would have achieved a rule of law, more primitive in its conception, but none the less efficacious for the maintenance of law and order. Nor need tyranny necessarily have ensued. For the absolutism of the monarch is a feature practically unknown to English history. Even Henry VIII was a rigid adherent to constitu-

<sup>1</sup> See Holdsworth, *History of English Law*, vol. ii (1923), pp. 121-133, 195, 196, and vol. x (1938), pp. 647-650.

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tional niceties, if the phrase may be permitted of an era which did not yet know the term, constitution. The famous *Lex Regia*, 1539 (Statute of Proclamations), did not give the King and the Council power to do anything they pleased by royal ordinance. It was in fact a genuine attempt by the King and Parliament to deal finally with the obscure problem of the authority possessed by proclamations. It safeguarded the common law, existing Acts of Parliament, rights of property, and prohibited the infliction of the death penalty for breach of a proclamation.<sup>1</sup> James I and Charles I could appeal to the law, relying on precedents of an earlier period with at least as much conviction as their opponents. But our concern is not with the seventeenth-century struggle, so much as with its results, which paved the way for modern constitutional developments.

The notion of the rule of law in the narrower sense of the predominance of the law of the State usually takes the form of the supremacy of certain fundamental laws. Modern constitutions which are based upon the continental rather than the British model stress the value of certain primary rights. The presence of such in a constitution is some guarantee of permanence; in theory they are intended to be unchangeable, unless the safety of the State demands temporary suspension. Even with us the idea of unchangeable rules of law finds some support, partly in the presence of Magna Carta in the forefront of the statute-book, more directly in

<sup>1</sup> Holdsworth, *History of English Law*, vol. iv (1924), pp. 102, 103; Adair, *English Historical Review*, vol. xxxii (1917), p. 35; and cf. Dicey's view on p. 51, *post*, which finds little support among modern authorities.

those provisions of the Bill of Rights and Act of Settlement which are accepted as the basis of the modern constitution.

In England the doctrine of the supremacy of the common law had to be reconciled with the claims of Parliament to supremacy. The recognition of the legislative powers of Parliament precluded insistence on the part of the lawyers that in the common law there existed a system of fundamental laws which Parliament could not alter, but only the judges could interpret. The price paid by Coke and his followers for their alliance with Parliament, which ensured the defeat of the Crown's claim to rule by prerogative, was that the common law could be changed by Parliament, but by Parliament alone. Moreover, the judges evolved a technique of interpretation which created a presumption against any but express alteration of the common law in interpreting statute law.<sup>1</sup> But the common law could never have achieved those radical changes in the State which were overdue even in the seventeenth century.

<sup>1</sup> Abandoning the mediaeval idea that there was a fundamental and immutable law, the common law recognised the legislative supremacy of Parliament. But to the words of the Parliament whose literal authority it thus recognised it accorded none of that aura of respect and generosity of interpretation with which it surrounded its own doctrines. The courts never entered into the spirit of the Benthamite game, but treated the statute throughout as an interloper upon the rounded majesty of the common law. The tendency still persists; the courts show a ripe appreciation of institutions of long standing, whether founded by statute or in the common law, but they inhibit themselves from seizing the spirit of institutions and situations which are in substance the creation of modern legislation. By repercussion draftsmen tend to concern themselves with minutiae, so that their intention may be manifest in every particular instance to upset the hydra-headed presumptions of the courts in favour of the common law. R. T. E. Latham, "The Law and the Commonwealth" in *Survey of British Commonwealth Affairs*, vol. i (1937), pp. 510-511.

These could, however, have been effected as well by the prerogative as by Parliament. But the alliance of Parliament and the common lawyers made it certain that in the long run the supremacy of the law would come to mean the supremacy of Parliament. "The supremacy of the existing law, so long as Parliament saw fit to leave it unaltered, was guaranteed by the powers of Parliament; and to Parliament they (the common lawyers) could safely leave the task of maintaining this position."<sup>1</sup> Sir William Holdsworth wrote these words of the sixteenth century, of a period before issue was joined with the Crown. But they were justified by the results of the revolution of 1689, which laid the foundation of the modern constitution. Much of Dicey's analysis of the rule of law rests upon this foundation, as a comparison between some of the principal provisions of the Bill of Rights and the contents of chapters v-x of this book will show. He discusses what Holdsworth calls the common law of the constitution, with special reference to personal liberty, liberty of discussion and freedom of assembly. The difference to-day is that Parliament no longer maintains a position which is acceptable to the common lawyers in so far as it has erected a vast body of administrative law. But in other respects, especially in the tradition of liberty of person and of discussion, there has been little change except when in times of crisis Parliament has authorised the Administration to rule by decree, as by the regulations made on the authority of the Defence of the Realm Acts, 1914-1915. The growth

<sup>1</sup> Holdsworth, *History of English Law*, vol. iv (1924), pp. 187-188.



of new functions of the State has made Dicey's analysis far from comprehensive, but in so far as "the principles of 1689 have become part of the accepted theory of democracy" it is still relevant to the modern constitution. As Jennings puts it,<sup>1</sup> there is much in the Whig philosophy with which any democrat will agree, and the Whig philosophy was derived from those principles of 1689. It is indeed the principal ground of criticism of Dicey's interpretation of the rule of law that it reflects the author's attachment to the Whig tradition. Thus the supremacy of the legislature, which by 1885 had become a representative legislature in fact as well as in name, the control by Parliament of the armed forces, the protection afforded by an independent judiciary against the excesses of administrative officials, and the illegality of illegal acts as being the means whereby the political doctrines of free discussion and free association are secured, are all in keeping with this tradition and therefore find their place in the analysis.

It was the attainment of independence by the judges of the higher courts which gave emphasis to Dicey's conception of the rule of law,<sup>2</sup> which rests upon the power of the courts to punish individual wrong-doers. There are, of course, two aspects of judicial independence—freedom from dictation by the Administration and freedom from control by Parliament. It is still an accepted constitutional doctrine that the Ministers of the Crown do not tamper with the administration of justice, but

<sup>1</sup> *The Law and the Constitution* (2nd ed., 1938), p. 296.

<sup>2</sup> Cf. Holdsworth, *History of English Law*, vol. x (1938), pp. 644-650.

Parliament indirectly has reduced the sphere of influence of judicial independence by the character of modern legislation. The abandonment of the principle of *laissez faire* has altered the nature of much of our law. A system of law, which like the common law is based on the protection of individual rights, is not readily comparable with legislation which has for its object the welfare of the public, or a large section of it, as a whole. The common law rests upon an individualistic conception of society and lacks the means of enforcing public rights as such. The socialisation of the activities of the people has meant restriction of individual rights by the conferment of powers of a novel character upon governmental organs. But these powers are exercised by an authority which is unquestionably as lawful as that by which the courts impose control in their own sphere. So far as the provision of State social services and the regulation of economic conditions have become part of the accepted philosophy of government, the rule of law still means the supremacy of Parliament. It is only, where constitutional law is concerned, in that small but vital sphere where liberty of person and of speech are guarded that it means the rule of the common law. For here alone has Parliament seen fit to leave the law substantially unaltered and to leave the protection of the freedom of individuals to the operation of the common law. Even so there are many examples to-day of interference with liberty by statutes. The Official Secrets Acts, 1911 and 1920, are outstanding examples.<sup>1</sup>

It is true that the supremacy of Parliament means

<sup>1</sup> See App. sec. ii (2), (A).

that as a matter of law the authority of administrative agencies may be still further enlarged. But the difference between judicial and administrative agencies is not fundamental. Both apply the law to individual cases and thereby exercise a discretion. History has shown that in the absolutist State rule by the administration is arbitrary. But if the safeguards which protect the exercise of the judicial function are applied to administrative bodies this result need not follow.<sup>1</sup> It is not the case that Dicey failed to realise that all lawful authority within the State is legal authority, but he relied upon the one organ, the courts, to restrain the illegal excesses of the other, the administration, and did not examine the extent of the latter's lawful powers. It is upon this limited view of administration that his interpretation of the rule of law rests. But the change of emphasis in the functions of the State has not destroyed the older principles which are protected by the rule of law as Dicey interpreted it in the field of personal liberty.

For behind the elaborate organisation of governmental machinery there rests a fundamental assumption of faith in a democratic form of government. This assumption gives rise to a belief, sentiment, principle or prejudice (it may be named according to taste), which is firmly rooted in public opinion, that there must be no interference by Governments and Parliaments with freedom of speech and freedom of political association to ensure free elections. The appeal to reason must not be restricted by law ; for

<sup>1</sup> Cf. Lauterpacht, *Function of Law in the International Community* (1933), ch. xix, sec. 2.

it is the basis of the democratic form of government. By limiting the restrictions upon liberty of person and speech to offences against the common law determined by impartial judges, by emphasising the personal liability of officials for their unlawful acts, Dicey was giving expression in terms of law to what is still regarded as a principle of democracy. The value of this is more evident in 1938 than it ever was in the author's lifetime.

If it be conceded that the rule of law as a feature of the British constitution was viewed by Dicey through spectacles that were tinted by a fixed conception of the desirability of restricting the powers of administrative officials coupled with a misunderstanding of *droit administratif*, there remains the undoubted fact that arbitrary power is to-day resented and feared to an even greater extent than in the late nineteenth century in those States which retain their faith in a democratic form of government. In so far as the rule of law connotes the absence of arbitrary power, it is important that the individual should have the assurance that the law can be ascertained with reasonable certainty. A person who takes the trouble to consult his lawyer ought to be able to ascertain the legal consequences of his actions. The reason why lawyers are in the main critical of powers of delegated legislation and the exercise of powers of judicial and quasi-judicial decision lies in the uncertainty which they are alleged to produce. It may be conceded that the private law on many matters is difficult to ascertain with any assurance. But in public law there may be the added uncertainty produced by the bulk and detail

of regulations enacted by Government Departments and the impossibility of predicting how a ministerial discretion will be exercised. *Droit administratif* has frequently enriched by its decisions the civil law of France<sup>1</sup> simply because it is administered by a regular tribunal which has in fact all the attributes of a judicial court. This may also be true of the varied forms of administrative tribunals which have come into existence in this country. But it is difficult to assess what is the value of their contribution. Their types are so various, their decisions promulgated in so many ways, that there can be little, if any, certainty of the state of the law. Perhaps the main defect lies in the absence of any assurance of a consistent technique of interpretation which alone can make the decisions of administrative tribunals reasonably foreseeable. A lawyer is a useful member of any public body if only because his professional training imparts a faculty of consistency. A system, or perhaps lack of system, which forbids the introduction of a final and authoritative body to determine the law and to provide a ready means of ascertaining the limits of administrative discretion is at a disadvantage which a lawyer should readily appreciate.

There is another element which may explain the criticisms which are directed at these aspects of administrative law. Delegated legislation is not, except in form, sanctioned or controlled by a majority in a democratically elected Parliament. Obedience to an Act of Parliament so enacted is readily obtained because the law is regarded as representing the general will of the people. Its passage through

<sup>1</sup> For examples see App. sec. i (4).



Parliament can be followed in the press, and its provisions perhaps modified to meet popular criticism. A Government Department may be at pains to consult all those organised interests which are likely to be affected by regulations which it proposes to promulgate. Nevertheless, there is a feeling of impotence among objectors which is less marked when they are called upon to observe the provisions directly enacted by an Act of Parliament. Hence there springs up a feeling that ministerial legislation is uncontrolled, and therefore does not represent the general will of the country. Such a belief engenders disrespect for the law, which may well ripen into active disobedience.

*Application of the Rule of Law to-day.*—It is difficult to compare the operation of the rule of law as Dicey understood it in 1885 with its operation to-day. It has troubled students ever since it was expounded, and for many years now it has been the fashion to attack its accuracy.<sup>1</sup> But it found favour in the sense in which it was interpreted by Dicey with the Committee on Ministers' Powers, though the Report, after a brief historical summary, contented itself with a repetition of the three meanings which Dicey attributed to the principle. And it is the doctrine upon which have been based most of the objections to the modern administrative system.

A discussion upon administrative law in England and France with special reference to the legal liabilities of officials will be found in the Appendix.<sup>2</sup>

<sup>1</sup> See especially Jennings, *The Law and the Constitution* (2nd ed., 1938), App. ii, for a brilliant attack upon the correctness of the principle.

<sup>2</sup> Administrative Law, App. sec. i (2) and (4), *post*.

It will be seen later<sup>1</sup> that Dicey himself went far in his reluctant recognition of that branch of English public law. Here it will suffice to give the author's summary<sup>2</sup> of the meanings of the doctrine of the rule of law, to refer to its influence upon the study of the constitution and to state some of the difficulties of its acceptance under modern conditions.

1. In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law.

2. Every man's legal rights or liabilities are almost invariably determined by the ordinary courts of the realm.

3. Each man's individual rights are far less the result of our constitution than the basis on which the constitution is founded.

A glance at the table of contents of Part II of Dicey's text reveals that the Army and the Revenue were the only branches of central administration which came under consideration by the author. With local government he was not directly concerned, but police powers figure prominently in the several chapters which deal with the liberties of the subject. It is the restrictions placed by law upon the exercise of power which are emphasised in the text. In a society which desired to limit the functions of the State to the maintenance of order and not to utilise taxation as a means of redistributing the wealth of the nation or to provide public social services, the Army, the Revenue and the Police in their relation to the individual subject are clearly the important topics for discussion. Even so Dicey was concerned with only one aspect of public

<sup>1</sup> Intro. p. lxxxvi *et seq.*, *post.*

<sup>2</sup> See pp. 202, 203, *post.*

administration—how these governmental activities can be controlled by the law and by ministerial responsibility to Parliament. But his emphasis is largely upon the former. The latter is a matter of constitutional convention which has entirely superseded legal liability to impeachment. Individual liberty of action and how it is guarded by the courts is the theme. His argument is that the courts afford remedies for all illegalities by whomsoever committed ; and that these are at least as effective as the guarantees contained in a formal constitution of the continental type, such as that of Belgium, which purports to reproduce the features of liberty so dear to Englishmen.

It is thus within a limited field that the rule of law in the sense of the exercise of lawful authority is expounded. Because the immunities enjoyed by the Crown are passed by without mention the picture is more favourable to individual liberty than was (and is still) the case in point of actual law. Moreover, it is solely with excess of power by officials that the author is concerned. Had he chosen to examine the existing scope of administrative law he would have been forced to enumerate, even in 1885, a long list of statutes which permitted the exercise of discretionary powers which could not be called in question by the courts. Abuse and excess only could be so checked. In particular the Public Health Act, 1875, afforded many examples of such powers. Successful administration depends, not upon the illegal use of power, but the exercise of discretion by the administrator. "It is unfortunate that Dicey paid no attention to discretions, for it might fairly

be said that they are the most important of all topics for the modern constitutional lawyer.”<sup>1</sup> It is natural that this exposition of the rule of law should serve as a text for those who are opposed to the collectivist activities of the modern State. But the application of the doctrines is of little avail to curb the activities of the modern administrator who is fully equipped with statutory powers and therefore has in law that “wide, arbitrary discretionary power”—a kind of statutory prerogative—wherewith to perform his branch of administrative activities for the public weal or oppression of the individual (according to the point of view adopted) unhindered by the courts, except if he acts *ultra vires*.

It will be more profitable to discuss here the exact application of the rule of law, as Dicey understood it, rather than to strive to apply it to the modern administrative system. The meanings may be paraphrased as follows :

1. Liberty of action by the individual in England is conditioned by the regular rules of law which the courts apply. This excludes arbitrary interference by the Government. Like private individuals the public authorities, their officers and servants, are liable both for their criminal acts and civilly in respect of breaches of contract and torts at the suit of an aggrieved person according to law, and only to law.

2. The courts of law are alone able to determine what is a breach of contract, a tort, or a crime.

<sup>1</sup> Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933), p. 130.

They apply the law equally to all men. The official position in the State of a particular offender does not protect him as an individual. He will be judged in the civil courts and not by a special tribunal.

3. Foreign constitutions contain statements of guaranteed rights. Such rights with us proceed from the enforcement of private rights by the courts, which will punish all illegalities. Therefore the constitution, so far as it is concerned with the protection of private rights, comes from the common law.

It must be noted that the trend of legislation has narrowed the meaning of liberty of action of the individual. Liberty has under statute been curtailed by the creation of a body of administrative law which makes lawful the activities of the Administration in many directions for which there is no justification under the common law. As an example may be taken the compulsory acquisition of land by a public authority. The owner is obliged to sell against his free judgment; he regards as inadequate the statutory rate of compensation. Moreover, tribunals have been established by Parliament which do not administer the common law or follow the procedure of a court of law. Doubts were raised, even by Dicey,<sup>1</sup> as to whether official law, *i.e.* administrative law, can be as effectively enforced by the High Court as by "a body of men who combine official experience with legal knowledge," provided that they are entirely independent of the Government of the day. Since administrative law is of

<sup>1</sup> 8th ed. (1915), p. xlviii.



equal validity with the common law, the latter has grown less significant as the field of its application narrows. It is only in the syllabuses of Universities and of the examinations for call to the Bar that English law still means chiefly the common law—private law. The practitioner knows full well the importance of statute law and groans under the burden of its detail. And a glance at the statute-book and the consequential statutory rules and orders for any year since (say) 1906, shows that legislation means for the most part regulation of individual liberty in the old sense. Unlike the rules of the judge-made common law the bulk of legislation is of application only to particular classes of subjects, *e.g.* to owners of certain types of property, to producers of a particular commodity, to those engaged in a particular industry.

It is worthy of note that it is but seldom that a public servant is sued for tort to-day unless he be a policeman whose zeal has led him to arrest the wrong person.<sup>1</sup> The improved standard of efficiency in the public services is not the sole explanation of this. In the case of local government officers and the servants of statutory corporations the person injured can sue the authority. Dicey was insistent on the liabilities of officers, but did not mention the liabilities of public authorities. But Parliament has clothed the administrator with legal powers wide enough for his task—too wide in the opinion of many. Unless he be of criminal intent, he has no need to infringe the law. So far as the administrator is sued in the courts to-day, it

<sup>1</sup> See App. sec. ii (1), Public Meetings, for an account of police powers with reference to political speakers.

is normally not for tort or breach of contract, but upon the interpretation of an enabling statute defining his powers. His responsibility is enforced, not in damages obtainable through the courts (for his opponent has suffered no wrong which is capable of redress by damages at common law), but by administrative or political action. At most the courts can grant an injunction to restrain repetition of the excess of power. More often a declaration as to the legal position is all that the subject seeks against the public authority.<sup>1</sup>

So the student is faced with two alternatives. On the one hand he may argue that the doctrine of the rule of law is to-day meaningless, since administrative law sanctioned by Parliament is as good law in the eyes of the courts as the oldest rule based on precedent or early statute. On the other hand he may confine its application to the limitation of power which the common law places upon all who would commit civil injuries or crimes. If he chooses the latter, he should note the great influence of Dicey upon the development of public law. His insistence (now widely rejected) upon the inadequacy of French administrative law to protect the individual has been largely responsible for the rejection of proposals for a final appellate tribunal with administrative experience to control public authorities and their servants in the performance of their duties. His faith in the courts as guardians of liberty has concealed the fact, upon which he did not dwell, that the Government Departments enjoy under the common law wide immunity from process. Above all, his interpreta-

<sup>1</sup> For the legal liability of public servants see App. sec. i (6).

tion of the rule of law has made Parliament reluctant to interfere with such fundamental liberties as freedom of person and of speech in its various manifestations. The desire to control property in all its forms and the need for State services of great variety have caused Parliament to accept from all Governments measures of administrative law. But Parliament has not (apart from emergency legislation in the war period) touched the antique machinery of habeas corpus procedure, fearing popular outcry. The exception is, however, significant. For by the Defence of the Realm Acts, 1914-1915, Parliament for the first time delegated generally to the Administration the power of suspending the writ of habeas corpus: *The King v. Halliday, ex parte Zadig*.<sup>1</sup> Not till 1934 did it reluctantly assent to the Incitement of Disaffection Act, to be followed, under outside pressure, by the Public Order Act two years later. Liberty of opinion, unchecked by fear of arbitrary imprisonment at the hand of the Administration, is still zealously guarded as a traditional liberty in a State which has not established a secret police force. This liberty can be explained by the doctrine of the rule of law as expounded in 1885. Thus Dicey is still invoked in the struggle to maintain our traditional liberty of person and of opinion, even though the doctrine of *laissez faire* has ceased to invest the owner of property with special political power.

*Dicey's Views in the Eighth Edition.*—Dicey wished in his last edition to make little change with regard to the principle of the rule of law and the nature

<sup>1</sup> [1917] A.C. 260; K. & L. 14; cf. the dissenting speech of Lord Shaw.

of *droit administratif*. But he noted (A) a marked decline in the modern Englishman's respect or reverence for the rule of law ; and (B) certain changes in the French system.

A. Holding the view which he did of the nature of the rule of law he regarded its sphere as having been diminished by the tendency of legislation of the period (1902-1913) to confer judicial powers upon various officials. He saw a growing distrust of the judges and the courts as instanced by the preference shown by trades unionists for enforcing trade rules through their unions—rules which he noted often came into conflict with the law. It may be remarked that it is not the artisan alone who feels the force of the doctrine of restraint of trade in relation to combination of trade interests. Moreover, Dicey saw lawlessness increasing among the clergy as regards the law of the Church ; passive resistance by dissenters to the payment of taxation as a protest against expenditure upon an object not approved by a class of taxpayer ; conscientious objection which defeated the vaccination law ; and above all the lawlessness of the militant suffragette. He was perplexed by these phenomena which he attributed in part to the false idea that any kind of injustice may under a democratic government be rightly opposed by the use of force. He also regarded lawlessness as suggested by the misdevelopment of party government. "The rule of a party cannot be permanently identified with the authority of the nation or with the dictates of patriotism." Liberal Governments had held power for eight years when these words were penned. They might with equal force be

repeated in this eighth year of government by a National Ministry. His final words on the subject admitted that armed rebellion might occasionally, though very rarely, be morally justifiable.<sup>1</sup> Here is a reference to the events in Ulster in 1914 where resistance was threatened to the Government's Home Rule Bill, which was about to pass into law under the provisions of the Parliament Act, 1911.

The foregoing is an attempt to summarise what is perhaps that part of the author's final introduction which has least permanent value. The causes which made for lawlessness have now lost interest; their place is taken by clashes between fascists and communists at home, Jews and Arabs in Palestine; while the modern motorist disregards the law to a far greater extent than the passive resisters and conscientious objectors of twenty-five years ago. Yet we are on the whole a law-abiding community; our police do not carry lethal weapons as part of their normal equipment to-day, nor did they, as a rule, in Dicey's day. But it may confidently be asserted that it is the public social services of the twentieth century which are more responsible for the absence of violence in politics than the rule of the common law.

B. With regard to *droit administratif* the judicial character of the *Conseil d'Etat* and the work of the *Tribunal des Conflits* were acknowledged by Dicey, as was less willingly the officialism of English law. Perhaps the last sentences of this part of the Introduction showed a change of heart, for the effectiveness of the High Court to enforce official law is questioned. He

<sup>1</sup> 8th ed. (1915), pp. xxxvii-xxlviii.



certainly envisaged the advent of a final administrative tribunal as well as affording recognition of merit in the *Conseil d'Etat*. "Nor is it quite certain that the ordinary law courts are in all cases the best body for adjudicating upon the offences or the errors of civil servants. It may require consideration whether some body of men who combined official experience with legal knowledge and who were entirely independent of the Government of the day might not enforce official law with more effectiveness than any Division of the High Court."<sup>1</sup>

*Dicey's Later Views on the Rule of Law.*—At this point it may be interesting to compare the views expressed in the author's "Outline of Subject"<sup>2</sup> in words which remained unaltered in substance throughout the eight editions, with what he wrote in 1914 in the Introduction to *Law and Opinion*,<sup>3</sup> and again early in 1915 in his article, "The Development of Administrative Law in England."<sup>4</sup> Incidentally, if Dicey could with propriety use the term, administrative law, twenty-three years ago, the present generation need not hesitate over the nomenclature of this branch of constitutional law.

It will be seen<sup>5</sup> that the view was expressed that constitutional law was a province of law, the field of which had not been fully mapped out. The footnote acknowledged the contribution to this task made by Sir William Anson's later work. This work, however, even in its present form, practically

<sup>1</sup> 8th ed. (1915), Intro. p. xlviii.

<sup>2</sup> Pp. 1-35, *post*.

<sup>3</sup> 2nd ed. (1914).

<sup>4</sup> *Law Quarterly Review*, vol. xxxi (1915), pp. 148 *et seq*.

<sup>5</sup> Pp. 33, 34, *post*.

excludes consideration of the substance of administrative law, fully though it deals with the organisation of many of the Departments of State.

In formulating the well-known division with its savour of Austinian dogma between rules which are true law—the law of the constitution—and rules which are not laws—conventions of the constitution—the examples given make it clear that Dicey was concerned only with the King, especially in his relations with the Cabinet, the Central Legislature and the Superior Courts of Record. The administration of public social services hardly entered into his purview.<sup>1</sup>

In 1914 Dicey wrote <sup>2</sup> that “by 1900 the doctrine “of *laissez faire*, in spite of the large element of truth “which it contains, had more or less lost its hold “upon the English people.” He pointed to the progress of collectivism in the years 1906–13,<sup>3</sup> citing such important sources of administrative law as the Old Age Pensions Act, 1908, the National Health Insurance Act, 1911, the Coal Mines (Regulation) Act, 1908, and the Coal Mines (Minimum Wage) Act, 1912, together with the Finance (1909–10) Act, 1910, and other examples. He noted<sup>4</sup> that the National Health Insurance Act had greatly increased the legislative and judicial authority of the Government or of officials closely connected with the Government of the day and admitted<sup>5</sup> that the Insurance Act had created in England a system

<sup>1</sup> But see pp. 388–390, *post*.

<sup>2</sup> *Law and Opinion* (2nd ed., 1914), pp. xxix, xxxi.

<sup>3</sup> *Op. cit.*, p. xxxiii.

<sup>4</sup> *Op. cit.*, p. xxxix.

<sup>5</sup> *Op. cit.*, p. xliii.

bearing a marked resemblance to the administrative law of France ; and further that such law had some distinct merits. He went on<sup>1</sup> to discuss the causes of the main current of legislative opinion from the beginning of the twentieth century being vehemently towards collectivism. The interdependence of public and private interests, as with the railway companies and their individual shareholders, made it difficult to maintain the antithesis between the individual and the State. The reader to-day will marvel that he noted a decline in the passion for nationalism and the disappointment at what it had achieved in Germany and Italy. This, he considered, and the declining influence of other movements, made socialism attractive. He expressed some astonishment at the general acquiescence in proposals tending towards collectivism, especially on the part of rich men towards proposals affecting property interests. He recognised the advent of a parliamentary democracy with the growing strength of a Labour minority. He recorded the spread of collectivism in other countries, and finally referred to the existence of industrial discontent. He saw, however, certain cross-currents.<sup>2</sup> The distrust of State interference was still entertained by the mass of English citizens. Collectivism was inconsistent, in his view, with true democracy. "The ideal of democracy is government for the good of the people, by the people and in accordance with the wish of the people ; the ideal of collectivism is government for the good of the people by experts or officials who know or think they know what is good for the people better than

<sup>1</sup> *Op. cit.*, pp. liii *et seq.*

<sup>2</sup> *Op. cit.*, pp. lxxi *et seq.*

“any non-official person or than the mass of the “people themselves.”<sup>1</sup> Opposition to the financial burdens of collectivism was natural in one whose political faith deplored the use of taxation for the promotion of political or social ends. Finally, Dicey confirmed his belief in individualism in no uncertain terms.<sup>2</sup> But the book leaves little doubt that its author realised the fundamental assumption of collectivism—faith in the benefit to be derived from State intervention—as the explanation of the opinion current in England at the opening of the present century.

The article, “The Development of Administrative Law in England,” was inspired by the decision of the House of Lords in *Arlidge v. Local Government Board*,<sup>3</sup> to be read together with *Board of Education v. Rice*.<sup>4</sup> The latter case had determined conclusively that an administrative Department had power to determine finally a question of law. *Arlidge's Case* showed that such a Department in the exercise of statutory functions of a judicial character need not follow the procedure of a court of law, but could employ any rules which appeared reasonable and fair for the conduct of its business. Dicey's deductions from the cases were as follows :

(1) Any power conferred upon a Government Department must be exercised in strict conformity with the terms of the statute.

(2) A statutory judicial or quasi-judicial authority is not bound to follow the rules of procedure applied

<sup>1</sup> *Op. cit.*, p. lxxiii.

<sup>2</sup> *Op. cit.*, p. lxxxvii.

<sup>3</sup> [1915] A.C. 120; K. & L. 199.

<sup>4</sup> [1911] A.C. 179.

in a court of law, but must act with judicial fairness and equity.

He then proceeded to inquire whether these deductions answered the following question: "Has recent legislation, as now (1915) interpreted by English courts, introduced, or tended to introduce, into the law of England a body of administrative law resembling in spirit, though certainly by no means identical with the administrative law (*droit administratif*) which has for centuries been known to, and during the last hundred years been carefully developed by, the jurists and legislators of France?"

He gave several considerations which suggested to him the right reply:

1. New governmental obligations of the past fifty years (1865-1915) almost implied, and certainly had promoted, the transference to Departments of the Central Government of judicial or quasi-judicial functions. These functions might, as with the procedure under the Workmen's Compensation Acts, have been left to the courts, but the obvious convenience of the transfer was conceded. Nevertheless "such transference of authority saps the foundation of that rule of law which has been for generations a leading feature of the English Constitution."<sup>1</sup> But, he continued, the Government, like an individual, cannot run a business as a court would conduct a trial. The two things must in many respects be governed by totally different rules.

2. He suggested that it was in harmony with the dominant legislative opinion of 1915 that the House

<sup>1</sup> *Law Quarterly Review*, vol. xxxi (1915), at p. 150.



of Lords should have held that the President of the Local Government Board ought to follow the rules which were found fair and convenient for the business of the Department rather than exercise the procedure of a court of law.

3. There remained two legal checks upon abuse of judicial or quasi-judicial power, (a) the *ultra vires* doctrine, (b) natural justice.

Dicey considered the check upon administrative irregularities afforded by ministerial responsibility, which was suggested by Lord Haldane in the *Arlidge Case*, to be a poor guarantee as compared with review by the courts, since it really meant responsibility to the majority for the time being in Parliament. He preferred to recall that legal action by the High Court of Parliament, impeachment, still remained part of the law of England. His hesitant answer to his own question was :

“ Modern legislation and that dominant legislative opinion which in reality controls the action of Parliament has undoubtedly conferred upon the Cabinet, or upon servants of the Crown who may be influenced or guided by the Cabinet, a considerable amount of judicial or quasi-judicial authority. This is a considerable step towards the introduction among us of something like the *droit administratif* of France, but the fact that the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true *droit administratif*.”<sup>1</sup>

While Dicey retained his old distrust of the

<sup>1</sup> *Law and Opinion* (2nd ed., 1914), p. 152.

French administrative system, and his faith in the English courts to deal with breaches of law by servants of the Crown, he seems to have misunderstood the developments in the French system from 1872 onwards<sup>1</sup> and not sufficiently to have regarded the immunities which the prerogative rule—the Crown can do no wrong—afforded, and still largely affords, to Crown servants in this country.

Enough has been said of Dicey's attitude to developments in the twentieth century to show that he recognised the existence of administrative law in England. It is easy to confuse this admission with his earlier criticisms of the French system. Time has shown that the recognition was correct. The criticisms have been answered by many subsequent writers.<sup>2</sup>

*The Rule of Law as a Defence against Arbitrary Government.*—Basing himself on the interpretation of Dicey, a distinguished writer on the constitution, Professor Berriedale Keith,<sup>3</sup> finds in 1938 in the rule of law: (1) the rule that judicial decisions shall be based upon fixed principles already established; (2) the rule that legislation must favour the limitation of executive and judicial power to deal arbitrarily with individual rights; and (3) the rule that the Government should jealously respect its legal limitations.

(1) Whatever be the merits or demerits of our system of case-law, nobody will deny that the doctrine

<sup>1</sup> See App. sec. i (4), for an account of the French system and compare ch. xii, *post*.

<sup>2</sup> Jennings, *Law and the Constitution* (2nd ed., 1938), *passim*, esp. pp. 207 *et seq.* See also his article "In Praise of Dicey" in *Public Administration*, vol. xiii, 2 (1935); Morgan, *Introduction to Robinson, Public Authorities and Legal Liability* (1925), esp. pp. xlix-lxviii.

<sup>3</sup> Ridges, *Constitutional Law of England* (6th ed., 1937), pp. 25 *et seq.*

of judicial precedent seeks its justification in the desire to see justice and fair play in the administration of the law by reducing the powers of arbitrary interpretation open to individual members of the judiciary. The doctrine is a desirable corollary of the rule which confers independence upon the judges of the higher courts and of the tradition which grants them immunity from political attack. It may be agreed that it is totally contrary to the spirit of English Law that judges should have power, or be required, to punish actions from the point of view of their incompatibility with the ideals of a State system based upon a particular political ideology or should be able to impose sentences at discretion heavier than those allowed by the ordinary law.

In fact this amounts to little more than saying that English law reflects the prevailing opinion in favour of our particular form of government. When the law of Eire allows judges at their discretion to impose heavier sentences than those normally provided by law, the judges who impose such sentences are acting within the rule of law prevailing in that State, just as are the judges of the totalitarian States in punishing acts simply because they are contrary to the interests of their States, thus making conduct which is regarded by them as anti-social a crime. For the system of law there prevailing makes provision for such punishment. We may deplore the political philosophy of such States, but it is no help to an understanding of the legal principles of our own constitution to claim the rule of law—as a legal rule—as a unique feature of the British constitution. It is, as so viewed, merely a manifestation of

our political system which we may believe rightly, or wrongly, to be superior to that of our neighbours.

(2) That legislation must favour the limitation of executive and judicial power to deal arbitrarily with individual rights is clearly no more than a declaration of political faith. The popularity of this belief is illustrated by the distrust of bureaucracy which still prevails, despite the practice of Parliament to add to the complexity of the governmental machine. That there was ever a rule of law to this effect in the lawyer's sense is contradicted by the provisions of the statute-book many times every year. It may, however, be conceded that the common law is administered by rules of construction which favour individual rights, so far as they are not expressly or by necessary implication curtailed by statute.

(3) The rule that the Government should jealously respect its legal limitations is undoubtedly observed, the more readily because a Government can hardly be guilty of an illegality, since it can legalise any act, so long as it commands a majority in the House of Commons and remains in office long enough to place an Indemnity Bill upon the statute-book, with the assistance, if need be, of the provisions of the Parliament Act, 1911. In practice it is only in times of national crisis that the need for such a Bill arises, and Parliament at such a time is ready to support the action of the Government with the least possible delay, as instanced by the enactment of the Gold Standard (Amendment) Act, 1931. By this measure illegal orders of the Cabinet and illegal acts of the Bank of England were confirmed, and the Cabinet was given all the power which it needed

to set aside the existing law. The measure passed through both Houses of Parliament in a single day. A more recent example is to be found in the Essential Commodities (Reserves) Act, 1938, which gave retrospective authority for the expenditure of some ten million pounds already incurred without the usual appropriation by Parliament.

Thus it is still arguable that the rule of law serves to protect the subject from arbitrary government, but the command which the Government of the day exercises over Parliament shows that the protection is but slender. At most it can be said that the presence of an independent judiciary makes hard the path of an administration over-anxious to anticipate the time when it has given the force of law to its policy. Nor does it matter what is the content of that policy, once it has been enacted as law.

#### (4) CONVENTIONS OF THE CONSTITUTION

*The Widened Sphere of Constitutional Conventions.*<sup>1</sup>—Conventions are “rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised.”<sup>2</sup> Dicey was concerned to establish that conventions were “intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State.” He, therefore, concentrated attention upon the rules governing the use of the prerogative which precedent showed could be regarded as fundamental to the working of the

<sup>1</sup> For a brilliant exposition of this topic see Jennings, *The Law and the Constitution* (2nd ed., 1938), ch. iii.

<sup>2</sup> See pp. 422, 423, *n*, *post*.



Cabinet. He included also that part of the 'law and custom' of Parliament which rests upon custom alone, including the relationship between the hereditary Upper Chamber and the elected Commons. For between the prerogatives of the Crown and the privileges of Parliament there is a similarity. Neither are laws proper in the narrow sense that their exercise (as opposed to their abuse or excess) can be reviewed by the courts. The exercise of both is in law discretionary, but parliamentary government requires that each should be directed to reflect the supremacy of the electorate. This motive is seen no less in the Standing Orders of the House of Commons than in the precepts which surround the prerogative of dissolution. Potentially each may serve autocratic ends. Actually the Crown is guided in its use of the prerogative by the fundamental understanding that power may only be exercised on the advice of Ministers. Ministers are conventionally responsible to Parliament, though like civil servants they are also legally the servants of the Crown. Similarly, apart from those privileges which relate to the dignity of each House, the discretionary rules and customs of Parliament are designed to harmonise with the theory that in the long run the will of the electorate shall prevail. Nothing illustrates this better than the recognition of the rights of the Opposition, who have only lately received any sort of legal status in the provision for payment of a salary to their leader.<sup>1</sup> Conventionally the rights of the Opposition have

<sup>1</sup> Ministers of the Crown Act, 1937, ss. 5 and 10 (1). This Act is a good illustration of the assumption on the part of Parliament that conventions are part of the law.

long been recognised in Parliament. But conventions go much further than Dicey showed. "They provide for the whole working of the complicated governmental machine . . . the Cabinet has a life and an authority of its own. It is not concerned with prerogative powers alone ; it acts whether they are already legal powers or not. It co-ordinates the policy and the action of the Departments and produces unity in the constitutional system."<sup>1</sup>

The Cabinet is no longer chiefly concerned with action to be taken under prerogative powers, so far as its deliberations relate to internal government. It is one of the chief complaints of Dicey's critics that he neglected statute law in his interpretation of the rule of law. The same reason accounts for the emphasis upon the prerogative to illustrate conventions. The old prerogatives, as limited by the Bill of Rights, remain in the sphere of foreign affairs, the disposition of the Defence Forces, the affairs of the Empire and the Commonwealth, the exercise of patronage, including promotions in the Civil Service. But social services, economic planning, and indeed internal government in all its newer aspects are matters governed by the provisions of statute law. Policy is conditioned by legislation. A change of policy must be succeeded by an enactment to achieve it. Legislation is largely based upon a compromise which seeks to reconcile conflicting interests in the State. There has thus been erected complicated machinery for investigation and negotiation. Most of this is conventional, if the statutory advisory

<sup>1</sup> Jennings, *op. cit.*, pp. 86 and 83 ; and *Cabinet Government* (1936), ch. ix.

committees be excepted.<sup>1</sup> The outstanding feature is the extensive use of deliberation in committee. Within the framework of the Cabinet there are (1) formal committees, such as the Home Affairs Committee, which considers departmental Bills and co-ordinates the views of the Departments upon them before submission to the Cabinet with its recommendations; it also recommends Government business for each session :<sup>2</sup> (2) Committees appointed for particular purposes; these may remain in being after their original purpose has been fulfilled: under this head rather than the first may be instanced the Foreign Affairs Committee in 1938. Outside the Cabinet there are (3) the Committee of Imperial Defence and the Economic Advisory Council, the first-named being closely connected with an important part of the work of the Cabinet itself: (4) Consultative Committees constituted *ad hoc* by a Minister: (5) Royal Commissions: (6) Committees set up to report to Parliament: (7) Departmental Committees appointed by a Minister to investigate a particular problem. The last three types of organisation play an important part in formulation of policy, but less directly than does the Committee of Imperial Defence in its own ever-increasing sphere. None of them has more than advisory powers. There is no guarantee that a Government will accept their recommendations. But their reports are published and serve to focus public opinion upon a particular problem and to suggest a remedy. Few things have been more striking of recent years than the affection of

<sup>1</sup> See p. xliii, *ante*.

<sup>2</sup> Jennings, *Cabinet Government* (1936), p. 199.

successive Governments for this form of consultation. In the majority of cases, though a long interval may elapse, action is taken in whole or in part on the lines recommended. No appreciation of the working of the governmental machine would be complete without the inclusion of this practice.

To Dicey's two groups of conventions relating to the use of the prerogative and to the custom of Parliament must also be added those conventions concerned with the Dominions both in their relations with the United Kingdom and with one another.

*Dominion Status.*<sup>1</sup>—The Conference on the operation of Dominion legislation held in 1929 preceded the enactment of the Statute of Westminster. It expressed the view that "the association of constitutional conventions with law has long been familiar in the history of the British Commonwealth; it has been characteristic of political development both in the domestic government of these communities and in their relation with each other; it has permeated both executive and legislative power. It has provided a means of harmonising relations where a purely legal solution of practical problems was impossible, would have impaired free development or would have failed to catch the spirit which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be."<sup>2</sup>

<sup>1</sup> See generally K. C. Wheare, *The Statute of Westminster and Dominion Status* (1937).

<sup>2</sup> Cmd. 3479, 1929, p. 20.

It is under this group of conventions that the mixing of law and conventions most clearly demonstrates that the latter fall within the sphere of constitutional law. In *British Coal Corporation v. The King*<sup>1</sup> the legislative competence of the Parliament of the Dominion of Canada to restrict the prerogative right of the Crown to grant leave to appeal to the Judicial Committee of the Privy Council was upheld. In this case resolutions of Imperial Conferences were admitted in argument as sources of the highest importance from which to ascertain the law of the constitution. Lord Sankey, in delivering the opinion of the Board, actually cited a passage from the Report of the Imperial Conference, 1926, which accorded with the view expressed in the opinion.<sup>2</sup> The passage in question was an affirmation of the interpretation put upon the doctrine of non-interference by the Government of the United Kingdom.

The evolution, by means of Imperial Conferences, of Dominion status with all that it implies, and may imply, was based upon agreement. Co-operation and consultation have rested upon rapidly changing practices. The convention of non-interference has been interpreted in a different sense

<sup>1</sup> [1935] A.C. 500, at p. 507 and p. 523; J. & Y. 121.

<sup>2</sup> Cmd. 2768, 1926, at p. 19. "It was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals (i.e. to the Judicial Committee of the Privy Council) should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected." See also Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 120-121, commenting on the recognition of another convention in this case. At p. 511 of the Report Lord Sankey stated his opinion that the Committee was a court of law, though its statutory function was purely advisory.



after succeeding Imperial Conferences and differently by each Dominion. Only in the sphere of the legislative function of government is the matter governed by law since the enactment in 1931 of the fourth statute in constitutional history to bear the title—the Statute of Westminster. The Statute is a document which it is impossible to understand without a knowledge of the conventions which applied before its enactment. Up to that date legislative autonomy rested upon the convention of non-interference with the internal affairs of a Dominion by the Parliament of the United Kingdom. The convention was in direct opposition to the law embodied in the Colonial Laws Validity Act, 1865,<sup>1</sup> and occasionally broke down in consequence. Even in this sphere two Dominions, the Commonwealth of Australia<sup>2</sup> and New Zealand, have preferred to leave matters to conventions which directly negative the law and have declined so far to adopt the sections of the Statute which (*inter alia*) would free them from the legal fetter of the Colonial Laws Validity Act (s. 2), and purport to prohibit the Parliament of the United Kingdom from encroaching upon the legislative autonomy of a Dominion Parliament, except by request and with the consent of the Governments and (*semble*) Parliaments of the Dominions concerned (s. 4).

Equality between the various Governments of the Commonwealth, including those who have not

<sup>1</sup> See pp. 105-107, and *Nadan v. The King* [1926] A.C. 482; J. & Y. 93; and cf. *British Coal Corporation v. The King* [1935] A.C. 500; J. & Y. 121.

<sup>2</sup> The Commonwealth Parliament postponed consideration in 1937 of a Bill to adopt these sections.

yet adopted the Statute of Westminster, has been achieved by agreement reached at Imperial Conferences. It rests upon the convention of non-interference in the affairs of a Dominion which received its earliest, if partial, recognition in the grant of responsible government by the Crown. The scope of this convention has widened with each generation of Dominion statesmen. It received its final impetus as a result of the part played by the Dominions in the War and of their admission to separate membership of the League of Nations. It is no longer recognisable in the limited form in which it was propounded in the Durham Report of 1839.<sup>1</sup>

When the Imperial Conference of 1926 met to define the status of the Dominions in inter-Imperial relations, there existed the following limitations on autonomy additional to the fetter on legislative autonomy fixed by the Colonial Laws Validity Act :

1. The legal powers of disallowance and of reservation of Bills passed by the local legislature. These powers had long been allowed to lapse, so much so that it was left to the ordinary process of constitutional amendment to delete these powers in the case of a particular Dominion which might wish to take action, as the Union of South Africa has since done by its Status of the Union Act, 1934. The Statute of Westminster contained no provision to give effect to the removal of these legal limitations upon autonomy.

2. The Royal Prerogative. Many of the prerogatives of the Crown were vested in the Governor-

<sup>1</sup> See Keith, *The Sovereignty of the British Dominions* (1929), pp. 33 *et seq.*

General, as to whose appointment the King was advised by the Secretary of State for the Colonies, who later became a separate Secretary of State for the Dominions. Those relating to foreign affairs, however, were retained to be exercised by the King on the advice of his Ministers in the United Kingdom. Thus war was declared on the advice of the Cabinet in Downing Street, as it was in 1914. This declaration was regarded both by foreign States and by the Dominions as binding. So far as the latter were concerned, their subsequent action depended upon themselves alone, influenced partly by the attitude of international law to the enigma of the British Empire which was then regarded as a unity, as it still may be for purposes of war and neutrality. As regards treaties, whatever liberty was allowed to a Dominion, such as Canada, to negotiate a treaty, there was no convention which allowed the formal matters of treaty-making to be concluded save on advice to the King tendered by the Cabinet of the United Kingdom. Nor did practice provide for separate diplomatic representation of a Dominion.

By 1926 it was conceded that all this must change; and it was changed simply by action taken as the result of agreement. By the method of convention autonomy of status was defined. The Dominions and the United Kingdom "are equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations. . . . But the principles of equality and similarity appropriate to status do not univer-

sally extend to function. Here we require something more than immutable dogmas."<sup>1</sup> Progress towards equality of function has rapidly accompanied the attainment of equality of status, as the subsequent history of the Union of South Africa and of Eire shows.

So far as further legislation may be necessary to give effect to autonomy, it is agreed that the Government of the United Kingdom will ask Parliament to approve the enabling Act, for example, to amend the Constitution of the Dominion of Canada, which is still contained in the British North America Acts, 1867-1930.<sup>2</sup> But it is convention rather than law which can claim in this field its greatest achievement, the creation of a League of Nations bound in law by the link of a common Crown (and in the case of one member (Eire) even this is doubtful), in fact by the *Pax Britannica*. There are as yet difficulties to be resolved. The technique of consultation with the Dominions is imperfect, but it stood the severe and totally unexpected shock of the abdication of King Edward VIII.

To-day there are a number of matters<sup>3</sup> falling within the sphere of the prerogative as to which there has been a change of practice resulting from agree-

<sup>1</sup> Imperial Conference, 1926. Summary of Proceedings (Cmd. 2768).

<sup>2</sup> It is expressly provided by s. 7 of the Statute of Westminster that for the present the old machinery of constitutional amendment by the Parliament at Westminster should remain. A Royal Commission is at present considering the constitutional relations of the Dominion and its Provinces. Section 7 is unlikely to be repealed until agreement is reached in Canada upon a new method of constitutional amendment.

<sup>3</sup> The position of Eire (Irish Free State) is not included. Its present constitution came into force in December, 1937.

ment arrived at by the Imperial Conferences of 1923, 1926 and 1930.<sup>1</sup>

1. *Appointment of Governor-General.*—The Prime Minister of a Dominion advises the King direct as to the choice of the Crown's representative. The previous practice was for the Secretary of State for the Colonies, with the approval of the Prime Minister of the United Kingdom, to advise the King after informal consultation with the Government of the particular Dominion. The Commission appointing a Governor-General is no longer countersigned by the Secretary of State, but by the Dominion Prime Minister.

2. *Position of Governor-General.*—The Governor-General has ceased since the Imperial Conference, 1926, to be the representative of His Majesty's Government in the United Kingdom. In law he remains the representative of the Crown and in him are vested by delegation the prerogatives necessary for the government of the Dominion. Only the rights of declaring war and peace, of making treaties and appointing and receiving diplomatic agents, remain in the King and are not delegated by express or implied terms. By convention he is advised in the exercise of prerogatives by the Dominion Ministers. In the case of the Union of South Africa, however, the Executive Government is in all matters by statute (Status of the Union Act, 1934, s. 4) "vested in the King acting on the advice of his Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as

<sup>1</sup> See Imperial Conferences, 1923, 1926, 1930; Summaries of Proceedings (1923 Cmd. 1987, 1926 Cmd. 2768, 1930 Cmd. 3717).



his representative." This provision thus expresses in terms of law two conventional rules—the responsibility of Ministers as well as the independence of the King and his Governor-General from the British Cabinet in regard to the affairs of a Dominion.

Since 1926 it is accepted that the Government of the United Kingdom will give no instructions to a Governor-General which would conflict with advice tendered to him by Ministers in the Dominion where he represents the Crown. Moreover, though he does not enjoy quite the same position of impartiality as is traditionally associated with recent British Sovereigns, he is no longer any more than his Sovereign at liberty to exercise discretion in accepting ministerial advice. It is by agreement that the status of Governor-General has evolved from that of the Governor of a Crown Colony; in legal form the position of the two does not differ substantially even to-day, but by conventions, in the truest meaning of the term, the decisions of successive Imperial Conferences have advanced the Governor-General to the status of a constitutional monarch.

3. *Consultation between Governments of the Commonwealth.*—The machinery of Imperial Conferences meeting at intervals of three years and more is a convenient one for registering agreement as to the advance of Dominion autonomy. But an Imperial Conference has no power to take action. Its unanimous recommendations may never be adopted by the various Governments if there is a change of Government before action is taken by one member, as happened with the measures agreed upon for Imperial preference in 1923. Mr. Baldwin

failed to secure approval for this policy from the electorate and a Labour Government opposed to Imperial preference took office in his place in the United Kingdom. The necessary legislation was not introduced and accordingly reciprocal action by the Dominions to give the preferences did not ensue.

So far as continuous consultation is concerned, the work of Imperial co-operation is maintained in matters of urgency by direct communications between Prime Ministers. That the technique is as yet imperfect for formal consultation was shown at the time of the abdication in 1936. In routine matters the Dominions Office for the Government of the United Kingdom, as well as the High Commissioners whom each Dominion and India maintain in London, enable constant communication and information, particularly with regard to foreign affairs, to be exchanged. The Dominions Office was separated from the Colonial Office by administrative action in 1925. It serves as a channel of communication for Imperial affairs and is in fact a Department of the British Government for its relations with the Dominions. It has its counterpart in the office of Minister for External Affairs in each Dominion, though that Minister also acts as Foreign Minister for his State. There are a number of semi-autonomous authorities concerned with inter-Imperial problems, upon some of which the Dominions are represented, such as the Imperial Economic Committee, the Imperial Institute, the Imperial Mycological Institute. The Committee of Imperial Defence, the important consultative Committee with

the Prime Minister as its Chairman to assist in co-ordinating the action and policy of some eight Government Departments, maintains contact with the Governments of the Dominions through the Dominions Secretary. Representatives of the Dominions are invited to attend whenever matters affecting them are considered.

In relation to treaty negotiation and the conduct of foreign affairs generally it is agreed that—

- (1) "Any of His Majesty's Governments conducting negotiations should inform the other Governments of His Majesty in case they should be interested and give them the opportunity of expressing their views, if they think that their interests may be affected :
- (2) "Any of His Majesty's Governments on receiving such information should, if it desires to express any views, do so with reasonable promptitude :
- (3) "None of His Majesty's Governments can take any steps which might involve the other Governments of His Majesty in any active obligations without their definite assent."<sup>1</sup>

Subject to the observance of these conventional practices, a treaty may be concluded on behalf of any or all of the Governments of the British Commonwealth in the name of the King, namely, Canada, Australia, New Zealand, South Africa, Eire and India, which for this purpose is treated as a separate unit, though not as yet possessing full Dominion status. Thus the Government of the United Kingdom negotiates treaties only for itself and for those

<sup>1</sup> Imperial Conference Report, 1930, p. 26 (Cmd. 3717).

parts of the British Empire which are not separate members of the League.

4. *Relations with Foreign States.*—For all purposes but war and neutrality the Dominions may be regarded as independent States. The Treaty of Versailles, 1919, was signed by the United Kingdom for the British Empire generally as well as by the representatives of each Dominion for their own country. Admission to membership of the League of Nations and the International Labour Organisation, which carries with it eligibility for representation on the Council and the right to nominate judges of the Permanent Court of International Justice, is recognition by all other member States of independent status. The acceptance of separate diplomatic representation at certain foreign Capitals is further recognition. Treaties are entered into with foreign States, bearing in some cases the separate seal of the Dominion, in place of the Great Seal. The exercise of the treaty-making power is subject to rules agreed upon at the three Imperial Conferences and has been accepted by other States.

5. *Appellate Jurisdiction of Judicial Committee of the Privy Council.*—Finally there is a matter of prerogative where conventional usage plays only a small part. There was preserved by the Judicial Committee Acts, 1833 and 1844, the right of the Crown, exercisable in practice by the Judicial Committee, to grant leave to any of its subjects to appeal from a decision of a colonial court. No colonial legislature has power to abolish this prerogative except under the authority of an Act of Parliament. For the right was made statutory by the Acts of

1833 and 1844 and the rule of repugnancy under s. 2 of the Colonial Laws Validity Act would operate.<sup>1</sup> So far as this objection applied to the abolition of the right by a Dominion Parliament, it has ceased to operate with the repeal of the Colonial Laws Validity Act in its application to a Dominion by s. 2 of the Statute of Westminster. This Act has also (s. 3) removed any objection based upon the extra-territorial effect of colonial legislation. It has been expressly decided in *British Coal Corporation v. The King*<sup>2</sup> that the Parliament of the Dominion of Canada has power to abolish the granting of special leave to appeal in criminal cases. It is implied in s. 10 of the Status of the Union Act, 1934, that the Union could, if it wished, abolish the prerogative right. The Commonwealth Constitution, 1900, para. 74, restricted the grant of special leave to appeal in cases involving the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, as well as of the constitutional powers of any two or more States. It also provided that the Commonwealth Parliament should have power to make laws limiting the matters in which leave to appeal might be asked.

All this leaves little room for conventional practice. But it is worth recording that the Imperial Conference, 1926, stated its agreement that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise

<sup>1</sup> See p. ci, *ante*; cf. *Nadan v. The King* [1926] A.C. 482; J. & Y. 93.

<sup>2</sup> [1935] A.C. 500; J. & Y. 121. See p. c, *ante*.



than in accordance with the wishes of the part of the Empire primarily affected." The repeal of the Colonial Laws Validity Act in its application to the Dominions has made it possible for all the Dominions (but not the Australian States and probably not the Canadian Provinces) to determine these questions as a matter of law for themselves. So far as the prerogative right to grant special leave remains, the Judicial Committee has placed on record the manner in which it exercises its discretion. This statement shows that the Committee endeavours to interpret its function upon the principles of autonomy.

We are not Ministers in any sense ; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this : it is a long-standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with policies, or party considerations ; we are really judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself, and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed form. It is a report as to what is proper to be done on the principles of justice ; and it is acted on by the Sovereign in full Privy Council ; so that you see, in substance, what takes place is a strictly judicial proceeding.

That being so, the next question is : what is the position of the Sovereign sitting in Council in giving formal effect to our advice, and what are our functions in advising him ? The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free

State body. There sit among our numbers Privy Councillors who may be learned judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had others, from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India as he may sit here, and it is only for convenience, and because we have a court, and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial court which represents the Empire, and not any particular part of it. It is necessary to observe what effect that has upon the present situation. The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justice, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case that I need refer to where there has been any modification.

In Ireland, under the Constitution Act,<sup>1</sup> by Art. 66, the prerogative is saved, and the prerogative therefore exists in Ireland, just as it does in Canada, South Africa, India, and right through the Empire with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia. That being so, the Sovereign retains the ancient prerogative of being the supreme tribunal of justice; I need not observe that the growth of the Empire and the growth particularly of the Dominions, has led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It is obviously proper

<sup>1</sup> The Constitution of 1922 was replaced, after many amendments, in 1937 by the Constitution for Eire (Ireland).

that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if, in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally—I am not laying down precise rules now, but I am laying down the general principles—unless the case is one involving some great principle or is of some very wide public interest. It is also necessary to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. For instance, in States that are not unitary States—that is to say, States within themselves—questions may arise between the central Government and the State, which, when an appeal is admitted, give rise very readily to questions which are apparently very small, but which may involve serious considerations, and there leave to appeal is given rather freely. In Canada there are a number of cases in which leave to appeal is granted because Canada is not a unitary State, and because it is the desire of Canada itself that the Sovereign should retain the power of exercising his prerogative; but that does not apply to internal disputes not concerned with constitutional questions, but relating to matters of fact. There the rule against giving leave to appeal from the Supreme Court of Canada is strictly observed where no great constitutional question, or question of law, emerges. In the case of South Africa, which is a unitary State, counsel will observe that the practice has become very strict. We are not at all disposed to advise the Sovereign, unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal. It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere,

but the genesis of that is the requirements of India, and the desire of the people of India. In South Africa, we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please. We go upon the principles of autonomy on the question of exercising the discretion as to granting leave to appeal. It is within the Sovereign's power, but the Sovereign, looking at the matter, exercises this discretion.<sup>1</sup>

It is unprofitable to speculate upon the effect of Dominion autonomy in the event of a war in which Great Britain may be involved. Such an event might well prove the solidarity of the British Commonwealth, as it did in 1914. But there have been numerous declarations on the part of Dominion statesmen claiming the right to remain neutral in such a war. Others have declared with equal emphasis that the separate defence of a Dominion is an idle dream and that constitutional niceties should be disregarded in preparing for the mutual defence of all parts of the Commonwealth. In support of the former school of thought may be instanced the constitutional practice, which prevents a military establishment for training members of the Crown Forces of the United Kingdom being set up in time of peace, *e.g.* in Canada. For autonomy demands that all military establishments must be owned, maintained and controlled by the Dominion Government alone. On the other hand the association between the Royal Navy and the Royal Australian Navy in the Pacific is a close one.

<sup>1</sup> Extract from the Speech of Lord Haldane in *Hull v. M'Kenna and Others* [1926] I.R. 402.

Australia and New Zealand are peculiarly vulnerable to hostile sea-power, but as yet unable to maintain the burden of adequate naval defence.

The anxiety of the Dominions lest they should be involved in a general war in which Great Britain participated on the continent of Europe is one that must evoke sympathetic understanding in this country. But so dubious is the assurance that neutrality on the part of any Dominion, at all events in the event of a general naval war, would be possible that the rearmament of Great Britain against perils from Europe has been accompanied by similar precautions on the part of the Dominions on a scale proportionate to their resources. To this extent there is recognition that autonomy to conduct foreign relations in time of peace may not be recognised by States which may in the future be at war with Great Britain as including the right of the Dominions to remain neutral.

*Conventions and the Increase of Governmental Power.*—Dicey saw in the conventions which he noted as new in 1914<sup>1</sup> a general tendency to increase the power of any party which possessed a parliamentary majority. "Party warfare in England is, in short, conducted by leading parliamentarians who constitute the actual Cabinet or the expected Cabinet. . . . It may be maintained with much plausibility that under the quinquennial Parliament created by the Parliament Act the British electorate will each five years do little else than elect the party or the Premier by whom the country shall be governed for

<sup>1</sup> Presumably he excluded his observations on the habits of reigning monarchs; see 8th ed. (1915), pp. l-li.



five years.”<sup>1</sup> He noted the decline in the influence of the private member and that legislation had become in effect the business exclusively of the Cabinet. “The plain truth is that the power which has fallen into the hands of the Cabinet may be all but necessary for the conduct of popular government in England under our existing constitution.”<sup>2</sup>

In 1938 it is even more apparent that the power of the Government of the day, and particularly of the Prime Minister, has increased.<sup>3</sup> Certain factors, new since 1914, may be noted. It was the emergency period of the war of 1914-1919 which left its legacy in the form of a strengthened administration. The formation of the War Cabinet was a recognition that control of policy could be divorced from departmental duties when all governmental activity required to be subordinated to the attainment of a single object. This Cabinet consisted of five Ministers, to whom was added later General Smuts, a member of neither House of the United Kingdom Parliament. Except the Chancellor of the Exchequer no member of the Cabinet held an office requiring attention to onerous departmental responsibilities. Quick decisions were needed. The task of the War Cabinet was to take those decisions. The precedent of the War Cabinet was not repeated after 1919, but it showed how the machinery of government could

<sup>1</sup> *Op. cit.*, pp. lv-lvi. The Parliament Act may also be regarded as strengthening the hand of any Cabinet in which the Conservative Party does not predominate.

<sup>2</sup> *Op. cit.*, p. lvi.

<sup>3</sup> Even of a Prime Minister like Mr. Ramsay MacDonald who for four years led a Government which was supported by only a handful of his former political associates.

effectively be speeded up in a crisis.<sup>1</sup> The reversion to the normal type of Cabinet has, however, been accompanied by some increase in the employment of sinecure office holders of Cabinet rank (such as the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Duchy of Lancaster), upon special tasks to assist chiefly the Prime Minister and the Foreign Secretary. For a short while in 1935 a Minister without even nominal departmental duties was appointed, again following a war-time precedent.<sup>2</sup> In 1937-38 the Chancellor of the Duchy of Lancaster was given a seat in the Cabinet and attached successively to the Air Ministry and to the Home Office as an extra-ordinary Minister with duties in those Departments. The Committee on the Machinery of Government, of which Lord Haldane was chairman, advocated in 1918 a Cabinet of twelve and a more logical distribution of responsibility and functions between the Cabinet and Departmental Ministers outside the Cabinet. This recommendation was not adopted, largely because the War Cabinet experiment had shown that Ministers had been deprived of an effective voice in matters concerning their Departments. But greater co-ordination of the Service Departments and other Departments connected with problems of defence has been secured by the appointment of a Minister for the Co-ordination of Defence. This appointment

<sup>1</sup> In the European crisis of 1938 there were frequent public references to the Inner Cabinet, consisting of the Prime Minister, the Chancellor of the Exchequer, the Home Secretary and the Foreign Secretary. See also Jennings, *Cabinet Government* (1936), pp. 196-198, 204.

<sup>2</sup> Lord Eustace Percy. The same Cabinet contained another Minister without portfolio, but he was responsible for the conduct of foreign affairs in collaboration with the Foreign Secretary.

has been accompanied by a drastic revision of the constitution and work of the Committee of Imperial Defence.

A most important factor in increasing the power of the Cabinet, and particularly of the Prime Minister, has been the institution of the Cabinet Secretariat, another legacy of war-time administration. An informal committee which kept no records (save the Prime Minister's letter to the King) has been changed into a body whose decisions ("conclusions") are recorded in a form which gives a summary of the information and the general nature of the arguments upon which decisions are based.<sup>1</sup> Thus the responsibility of the Departments has been diminished as that of the Cabinet has increased. Normally a Minister, if in the Cabinet, orders his Department to take the necessary action. If not, a conclusion is communicated by the Cabinet to the Minister and has to be carried out: in the past it rested largely with the individual Minister concerned to interpret the deliberations of the Cabinet in his own terms. Particularly is this increased power of the Cabinet and of its Chairman, the Prime Minister, to be observed in the sphere of foreign affairs. Mr. Lloyd George and others have revealed that in the eight years from 1906 to 1914 foreign affairs seldom occupied the time of the Cabinet.<sup>2</sup> It is clear that in recent years by reason of the succession of political crises abroad, if for no other reason, the Cabinet has been more closely in touch with the work of the Foreign Office.

<sup>1</sup> Jennings, *Cabinet Government* (1936), pp. 212-213.

<sup>2</sup> *War Memoirs* (abridged ed., 1938), vol. i, pp. 27 *et seq.*

Any technique which increases the efficiency of Cabinet government necessarily places greater power in the hands of a Ministry. But apart from this, conditions of late years have been increasingly favourable to the concentration of power in the Administration. The huge majorities which have supported successive Administrations from 1906-10, 1914-21, from 1924-29 (to a less degree) and continuously since 1931, have weakened the powers of Oppositions to oppose. The assumption of office by Coalition or National Governments has cut at the whole basis of party government. For it assumes, though not always successfully, that party and national interests are identical. This tends to put the Opposition in a false position of being regarded as anti-national, if they perform effectively the proper function of every Opposition, namely, to oppose. The essential condition of parliamentary government is that the Government should govern by agreement with the Opposition; but it is equally vital that the Opposition should be at liberty to criticise the Government. Wherever differences are possible, they should be settled by agreement preceded by reasoned argument, for one side of which the Opposition is mainly responsible. If a Government successfully identifies its policy as being synonymous with the honour and safety of the nation, the task of the Opposition becomes invidious and correspondingly the partisan authority of the party in power increases in extent.

The increasing complexity of the business of governing has certainly not relaxed the pressure which Cabinets put upon the House of Commons to

grant time for government business at the expense of private Members. Few Bills introduced by a private Member can to-day find their way to the statute-book unless they are unopposed measures or unless they are adopted after second reading by a Department or are blessed by Ministers who are able and willing to persuade the Government to leave time for the further stages in the Commons. The Matrimonial Causes Act, 1937, is one of the few highly controversial measures sponsored by private Members which have become law in recent years.

Another factor which has contributed to Cabinet domination is the reliance upon State assistance which is found in so many directions. Instead of being the body to resist the demands of the Crown for supplies until grievances have been redressed, the Commons to-day press for the redress of grievances by State subsidies, either by direct payments from the Exchequer or in various disguises, such as tariffs, quota payments or controlled prices. Nor does the process stop at financial assistance. There is an insistent demand for more and more regulation by the State which can best be summed up by the word, "planning." The result is that legislation has become almost exclusively a matter of government business. Legislation of this character is necessarily complex and cannot readily be amended in vital particulars, even if the Commons wished to do so, without wrecking the policy which it seeks to interpret in terms of laws. The Bill as presented to the House contains a carefully prepared and elaborate scheme, the work of expert hands; it is seldom amended except in details. It is only on



rare occasions, as with the first proposal for the national defence contribution tax in 1937, that a Government has to face serious opposition in the House. And in this particular instance it was notorious that the proposed tax had not been adequately considered by the Treasury, which was deprived of its customary consultation with the City of London. This was on account of the close secrecy which had been imposed upon the contents of the Budget Speech following upon disclosures to private individuals in advance of its delivery in the House of Commons on the previous occasion. The reluctance on the part of its opponents to force a dissolution of Parliament before due time is another factor which strengthens the position of the Government.<sup>1</sup> The cumulative effect of these considerations thus confirms Dicey's view that "the control of legislation and indeed the whole government of the country is in the hands of the Cabinet."<sup>2</sup>

The position of the Prime Minister, no longer *par inter pares*, in the Cabinet has undergone change in recent years. As chairman of a body whose decisions are directly put into operation at the order of Departmental Ministers charged with their execution, he is necessarily in a stronger position than in the days before the establishment of the Cabinet Secretariat. Previously it rested with individual Ministers to interpret the decisions of the Cabinet in terms of departmental action. The increase in the number of Ministerial posts to be filled by his choice has added to his political patronage. Junior Ministerial appointments are all made

<sup>1</sup> See p. cxxxii, *post*.

<sup>2</sup> 8th ed. (1915), p. lv.

by the Prime Minister, and not by the Secretary of State or Minister in charge of the Department. Recent Prime Ministers have all held the office of First Lord of the Treasury, which carries with it responsibility for the Establishments Branch of the Treasury. Advised by the Permanent Secretary to the Treasury, the uncrowned head of His Majesty's Civil Service, the Prime Minister as First Lord has sanctioned since 1920 all appointments to the highest Departmental posts in the Service.<sup>1</sup> But the chief factor in a Prime Minister's predominant position is that successive extensions of the franchise have made him more and more the direct choice of the people. The precedent of King George V's preference for Mr. Baldwin over Lord Curzon in 1923 may be regarded as establishing that the Prime Minister must be a member of the House of Commons.<sup>2</sup> Thus he must lead that House in practice, though he may delegate leadership for routine matters to a Cabinet colleague. The presence in the House of Commons of a majority pledged to support the policy of an individual statesman makes his relations with the Crown, with his Ministerial colleagues and with his

<sup>1</sup> Jennings, *Cabinet Government* (1936), p. 114. For the Prime Minister's relations with the Foreign Secretary, see *op. cit.*, pp. 164-180. The independence of the Foreign Office (p. 169) was probably checked by the Cabinet crisis of February, 1938, which culminated in the resignation of the Foreign Secretary, Mr. Eden.

<sup>2</sup> This precedent has been claimed as establishing a new convention, but it is perhaps premature so to regard it. It is also to be noted that a peer, despite protests in the Commons, could be appointed Foreign Secretary in 1938 in the person of Lord Halifax. But the practice certainly tends to harden in favour of the Ministers of the more important Departments having seats in the Commons, *e.g.* the resignation in 1938 of Lord Swinton as Air Minister and of Lord Harlech (on succeeding to the peerage) as Colonial Secretary.

supporters in the House very different from those of a Chief Minister of the eighteenth and even of the nineteenth century.<sup>1</sup>

*Dicey's Later Views upon Conventions.*—Dicey's analysis of constitutional conventions has been rightly described by his most formidable critic as a magnificent contribution to English public law.<sup>2</sup> Again he exceeds his self-imposed limitation upon the duty of a professor of constitutional law. "With conventions and understandings the lawyer has no direct concern. . . . His (a professor of law's) proper function is to show what are the legal rules (*i.e.* rules recognised by the courts) which are to be found in the several parts of the constitution."<sup>3</sup> If to-day the reasons he gave for obedience to conventions are generally rejected, we are grateful that they afforded him this excuse for discussing political theory.

He used the term, conventions, to describe the various customs, practices, maxims and precepts of which constitutional or political ethics consist. He then sought to explain—after a brilliant analysis of their content—the connection between the legal and the conventional elements in the constitution. The term, convention, was not happily chosen.<sup>4</sup> To the international lawyer it suggests express agreement upon definite matters, such as shipping laws, sanitary regulations or some branch of inter-State communica-

<sup>1</sup> Anson, *Law and Custom of the Constitution* (4th ed., 1935), vol. ii, pt. 1, p. 130.

<sup>2</sup> Jennings, "In Praise of Dicey," Article in *Public Administration*, vol. xiii (1935), 2.

<sup>3</sup> See pp. 30, 31, *post*.

<sup>4</sup> See Jennings, *The Law and the Constitution* (2nd ed., 1938), p. 80.

tions, like posts or telephones. It is only in the sphere of the constitutional relations between the members of the British Commonwealth that this meaning applies to constitutional understandings, and with conventions of this type the author did not deal. Nor could he properly have done so in 1885. But whatever the validity of the criticism, the term has been generally accepted to the exclusion of "custom," which Anson preferred, to describe the practices and understandings of which Cabinet government consists and which determine the working of the legislature.

A survey of the field of conventions in 1938 has necessarily covered a wider field than was open to examination in 1885. The author asked himself in 1914 whether there had been any notable changes at that date. He found the answer twofold, for: (A) new conventions had arisen and (B) old ones had been converted into enacted law, or their operation closely affected by changes in the law. For the latter Dicey found in the recent Parliament Act, 1911, the best examples of enacted conventions, just as to-day the Statute of Westminster, 1931, has brought legal form into harmony with the more recent conventions governing the exercise of legislative power by and in relation to the Dominions. Under the former head Dicey discussed the new convention which he considered all but compelled a Ministry when defeated at a general election to resign office. On four occasions between 1860 and 1886 a Ministry had resigned without waiting to meet Parliament, contrary to the leading precedent which had been set by Peel in 1834. This new convention

he considered to be an acknowledgment that the electorate constituted politically the true sovereign ; that a general election tended to decide that a particular party should hold office for the duration of a new Parliament, and in some cases to elect a particular Prime Minister for that period.

His other examples of conventions which had been developing in the preceding thirty years were : (1) the habit of the reigning monarch to share in and to give expression to the moral feelings of British subjects ; (2) the procedure adopted by the House of Commons to prevent obstruction, *i.e.* the various special devices for closure in order to expedite legislation.

What have subsequent developments shown to support these observations ?

A. (1) *Resignation of a Ministry following upon defeat at a general election.* In 1923 Mr. Baldwin advised a dissolution in order to secure approval for introducing a system of tariffs as a remedy for unemployment. His party remained the strongest numerically after the election, but had no absolute majority over the Labour and Liberal Oppositions. The Conservative Government met Parliament, was defeated, and resigned. The next year Mr. Ramsay MacDonald's Labour Ministry, which commanded only one-third of the votes in the House, except when supported by the Liberals, was defeated on the Campbell case (withdrawal of a political prosecution). The Prime Minister advised a dissolution. The Conservatives were returned with a clear majority and the Ministry resigned without meeting Parliament. At the General Election, 1929, the Conserva-



tive majority was lost and the Government resigned. A Labour Ministry took office, though also without a majority, before Parliament met. The history of Ministries since 1929 afford no further guidance.

It may be agreed that Mr. Baldwin was not bound by Dicey's new convention in 1923; indeed the situation created by the electorate returning three opposing parties to the Commons in approximately equal numbers makes it even more difficult to accept the electorate as the "true political sovereign"; for that "sovereign" in 1923 had, in Austin's language,<sup>1</sup> failed to impose upon any party the trust "to be imported by the correlative expressions 'delegation' and 'representation.' " But clearly in 1924 and ostensibly, if less certainly, in 1929 the General Election decided that a new party should hold office with its acknowledged leader as Prime Minister.<sup>2</sup>

(2) *The habit of the reigning Monarch to share and give expression to the moral feelings of British subjects.* In 1938 it is permissible to say that—(a) King George V as witnessed by his actions during 1914–18, by the sympathy shown during his illness in 1928–1929, by the acclamation which greeted him and Queen Mary in 1935 on the occasion of his Jubilee (despite the attempt to make political capital out of the proposed celebration) showed to the full his appreciation of the ethical code which is expected of the Sovereign: (b) that King Edward VIII, who had long sought to develop the code by his closer

<sup>1</sup> See pp. 74, 75, *post*.

<sup>2</sup> See Emden, *The People and the Constitution* (1933), for a full discussion of the People as a deciding factor in the choice of Ministries, esp. pp. 199-236, 299-302. For the mandate principle, cf. Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 157-160.

contacts with the lives of the more humble and the more distant of his father's subjects, recognised, as did those who advised him, that the new convention must be extended into his domestic affairs. Incidentally, if Dicey be right in including this "political habit or convention," it is clearly outside the sanction of law proper, however indirectly enforced.<sup>1</sup> It can scarcely be argued that the breach of this convention in the form of an alliance with a twice-divorced American could have led to any action being taken in the courts against the King or his advisers who might have accepted responsibility for his marriage. (c) The rapidity with which action was taken by King George VI to restore the court régime of his father is evidence that his Ministers feared the pace at which the convention had been allowed to develop.

(3) *House of Commons procedure to prevent obstruction*. The Closure and its variations, the Guillotine and the Kangaroo,<sup>2</sup> are rules of the Commons which are enforced as law by the House, but are certainly not rules recognised by the courts. Parliamentary practice indeed closely resembles strict law in all its characteristics, save in the actual organ of enforcement. The refusal of the courts to determine a right to be exercised within the House itself, as instanced by *Bradlaugh v. Gossett*,<sup>3</sup> received confirmation in *The King v. Graham-Campbell, ex parte Herbert*,<sup>4</sup> where it was held that the sale of liquor

<sup>1</sup> See discussion on Sanctions to Conventions, pp. cxxxvi *et seq.*, *post*, and ch. xv.

<sup>2</sup> Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 151-152.

<sup>3</sup> (1883) 8 A.C. 354; see pp. 32, 33, *post*, and Wade and Phillips, *op. cit.*, pp. 135-136.

<sup>4</sup> [1935] 1 K.B. 594.

in circumstances which were alleged to infringe the provisions of the Licensing Acts within the precincts of the House was a matter only of internal regulation with which no court had jurisdiction to interfere. A further development of parliamentary procedure may be noticed. In 1935 an allocation of time for the various stages of the Bill was by agreement substituted for the Guillotine when the Government of India Bill was before the House. Such agreement could hardly be attained to-day, any more than in the Home Rule Bill controversies of the last century, in the case of measures which engender real opposition (except on the part of a small minority of supporters of the Government). But the precedent may well be followed in the case of non-contentious measures of agreeing beforehand a time-table for the discussion of a Bill in its various stages.

B. *Enacted Conventions as illustrated by the Parliament Act, 1911.* Dicey saw in the enactment of rules governing the relations between the two Houses in legislative matters: (1) some progress towards the establishment of an enacted constitution; (2) a great restraint upon, if not the abolition of, the royal prerogative to create peers to swamp the House of Lords; (3) the likelihood of each Parliament enduring for the full span of five years (which replaced the seven years of the Septennial Act, 1715)—a matter also affected by the payment of salaries to members from 1911 onwards; (4) power for the Commons' majority to resist or overrule the will of the electors; (5) peril to the Speaker's independent position.<sup>1</sup>

<sup>1</sup> 8th ed. (1915), pp. li-lviii.

The Parliament Act has remained, temporary in character though its preamble described it, the law for nearly thirty years. Only one measure has reached the statute-book through its provisions and with some amendment come into operation (Welsh Church Act, 1914); another was enacted, suspended and subsequently repealed (Government of Ireland Act, 1914). The positive effect is thus negligible, but this may be in part accounted for by the fact that since 1915 Coalition or National Governments have held office for the greater part of the time, thus avoiding the likelihood of conflict with the House of Lords. Nor has any Government which has been unable to command the support of the Lords been in power for more than two successive years during this period.

(1) *Progress towards an enacted constitution.* Just as the Statute of Westminster gave legal form to the convention of non-interference in matters of Dominion legislation, so the Parliament Act in more certain terms made law the conventional rule of some two and a half centuries that the Lords may not reject a Bill dealing exclusively with national finance. Until the rejection of the Finance Bill, 1909, this rule had been unbroken, with the exception of the rejection of the Paper Duties Bill, 1860, which led to the practice of Governments embodying their complete programme of new or amended taxes in a single Finance Bill. But the Parliament Act did more; for it destroys the power to reject measures other than those relating exclusively to finance and substitutes therefor a suspensive veto of a minimum duration of two years. This power of total rejection

had frequently been used and was subject only to the convention that at some point or other the Lords ought to give way to the Commons. An enacted constitution will normally provide for the solution of deadlocks between the two Houses of the legislature; cf. British North America Act, 1867, s. 26, and Commonwealth of Australia Constitution, 1900, para. 57. It may then be agreed that the enactment of constitutional practices which were ambiguous to some extent has at least reduced the risk of conflict between the Lords and the Government, should the former adopt an antagonistic attitude to the latter's legislative programme. It is not, however, easy to state how some of the rules prescribed by the Parliament Act, though undoubtedly laws proper, could be enforced in a court. It is unlikely that such a question could arise over the Speaker's duties of certification of Money Bills. The difficulty, moreover, applies with equal force to other constitutional enactments, which prescribe no sanction, *e.g.* the provision in the Bill of Rights that the election of members of Parliament ought to be free—a provision which goes to the root of the democratic principle in the constitution, however imperfectly it was fulfilled in the eighteenth century.

(2) *Creation of peers.* Dicey's opinion was that the Act operated as a great restraint upon, if not as the abolition of, the royal prerogative to create peers to swamp the House of Lords. This view will not be accepted to-day by those who are impatient of progress towards that social millennium which they envisage as capable of achievement only by administrative decrees issued under an Emergency



Act. For the enactment of this Act the suspensive veto of the House of Lords must be destroyed, so it is argued, immediately upon accession to power of a Government possessing a majority in favour of "social revolution." The justification for the drastic remedy of a constitutional revolution achieved by governmental decree is said to lie in the precedent of the emergency legislation in 1931 rather than in that of the Defence of the Realm Acts, 1914-15, which authorised the Administration to rule by Order in Council during the Great War. But most people will agree that the amendment of the Parliament Act and the establishment of a Second Chamber constituted upon a democratic basis with greater, rather than less, power than the present Chamber, are more in harmony with the process of evolution which has always characterised the history of our constitution than the drastic use of the royal prerogative to force the hand of the Lords to assent to their own destruction. Such an amendment itself would be subject to the Parliament Act as regards the mode of its enactment and, therefore, could not be rejected by the Lords for a longer period (three sessions) than that Act allows. It may be agreed that the precedent for asking the Sovereign's assent to the creation of a large number of peers to give the Government a majority in the Upper House has lost much of its force with the enactment of the Parliament Act. This has provided a substitute process for securing that the Lords do not reject a measure contrary to majority opinion. But it cannot be said that the prerogative power to coerce the Lords by new creations has been abolished.

(3) *Duration of Parliament for the full five years.* The Parliament elected in December, 1910, was dissolved eight years later, its life having been prolonged by statute four times beyond the five-year limit in order to avoid a general election in war-time. Only two subsequent Parliaments have had their duration influenced by considerations of the time limit. The Parliament elected in October, 1924, was dissolved in May, 1929, on the advice of Mr. Baldwin, who was Prime Minister throughout its duration. The "National" Parliament elected in 1931 (October) sat for four years before its dissolution in the autumn of 1935. So far as it is permissible to draw any deduction from these precedents, it may be said that a Prime Minister will choose the occasion which he deems most favourable to the Government party occurring within a period of up to twelve months before dissolution is required by law. Mr. Baldwin, who in the 1931-35 Parliament was the leader of by far the largest number of the supporters of the National Government, stated on one occasion that he regarded the life of Parliament as limited to less than the full five years for this reason of obvious expediency.

The result of payment of members may make the private member more reluctant to face a dissolution. This factor increases the command of the Government whips over their supporters and perhaps makes the Opposition (outside the Shadow Cabinet) less anxious to face the electors at an early stage of a Parliament's life. But there are other factors, including the huge expense involved in fighting a modern election, and the instability of even the

largest majority under conditions of universal suffrage, which operate to the same end.

(4) *The Commons and the Electorate.* The power of a majority in the House of Commons to resist or overrule the will of the electors is not an obvious result of the Parliament Act, so far as regards legislation other than Money Bills. There is a remote danger lest the absence of an effective veto by a Second Chamber might tempt a Government to force through under cover of the provisions of a Money Bill a new proposal opposed by a large section of the electorate. This risk is minimised, if not eliminated, by the provisions relating to certification of such Bills by the Speaker. Proposals for legislation other than Money Bills are subject to a suspensive veto for three successive sessions. They would, unless first introduced in the opening session of a new Parliament, only pass into law if the conclusion that a Parliament's life is limited to four rather than five years be accepted, either immediately before or after the next general election. If before, no Government would, in view of its forthcoming appeal to the electorate, risk taking advantage of the Parliament Act in the case of a measure which after three sessions still aroused substantial opposition in the country. If the passage of the Bill in the third session occurred after the general election, it could be validly claimed that the electorate had lately endorsed the Bill and objection could hardly be taken to its enactment.

(5) *The Speaker's position.* Lastly, the powers of certification conferred by the Act upon the Speaker led Dicey to see peril to his independent position. He feared lest the majority party would secure for

that office a partisan rather than a judge. Little has occurred since 1914 to confirm this view. The local organisation of one of the Opposition parties decided, in face of some disapproval from their parliamentary leaders, to oppose the sitting Speaker in his constituency in 1935. For many years the return of successive Speakers to Parliament had been unopposed. The motive was largely to protest against the constituency being deprived of active representation in the House by reason of the conventional rule which places the Speaker above party. The Speaker contested the election and was returned by an overwhelming majority in a constituency where the majority of supporters of his former party did not obviously predominate. So far as this incident may be taken as showing popular approval of the Speaker's impartial position, the conventional rule may be said to have been strengthened. Certification (or the refusal thereof) of Money Bills is automatic and has so far raised no difficulties by reason of definition or otherwise.

One final observation on the Parliament Act must suffice. There is some evidence that the prestige of the House of Lords has been increased, as Lord Esher predicted,<sup>1</sup> by the curtailment of its legal powers of rejection. The voice of reason is more readily heard when it can persuade, but no longer coerce. Those of the members, albeit a small minority, who are assiduous in their attendance to parliamentary duties, constitute an assembly of elder statesmen and pro-consuls of Empire as well as of industry and commerce. The principle of the

<sup>1</sup> See p. lxv, *ante*.

hereditary legislator is to-day indefensible (notwithstanding the survival of the houses of Cecil and Stanley), but the practice of conferring peerages upon leaders of public life does ensure in the House of Lords a body of experienced opinion which might otherwise be lost to politics.

It is the function of the Lords to debate policy where the enactment of legislation is not required. Foreign affairs in particular benefit from discussion away from the more controversial atmosphere of the Commons. Non-controversial subjects of legislation, *e.g.* measures of technicality such as law reform which are not affected by the usual cleavage between the Government and the Opposition, can conveniently be introduced in the Second Chamber with an assurance that they will receive fuller consideration by a small body of experienced opinion than is probable or possible in the Commons. There have been occasions of late years when the Lords have risen to far greater heights than the Commons. The debates in 1927 and 1928 on the Measures of the Church Assembly proposing the use of the reformed book of common prayer furnished an illustration of the superiority of the Lords over the popular assembly. Again it was the Lords (and not the Commons) who in 1937 secured the ear of the Government in regard to the "massacre by motor." But if there has been an increase in prestige accompanying the loss of power, there also remains the threat to democratic government in an assembly where the members of one Opposition party can be numbered on the fingers of the hand, while in the background lies the menace of the



legion of Conservative peers who might once again emerge as in 1909 from the "backwoods" to defeat a progressive Government and so hasten their own political annihilation.

*The Sanction to Conventions.*<sup>1</sup>—"The sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land."<sup>2</sup>

Before discussing this conclusion it is well to recall that Dicey excluded conventions from the province of the constitutional lawyer.<sup>3</sup> He justified the attention which he paid to the nature of conventions by showing their connection with law proper. This connection he found in the legal sanction which he regarded as securing ultimate obedience to conventions. He, therefore, assumed that constitutional law excluded conventions, however helpful an understanding of them might be to the constitutional lawyer. But this exclusion is not justified, even for the practitioner of law. For there are statutes which assume conventions as the basis of the law which they contain and cases where the judges have treated convention as law.<sup>4</sup> If it could be agreed that there was a clear division between those rules of the constitution which are obligatory because they are

<sup>1</sup> See especially Jennings, *The Law and the Constitution* (2nd ed., 1938), ch. iii, sec. 2.

<sup>2</sup> See pp. 445, 446, *post*.

<sup>3</sup> See pp. 30, 31, cf. pp. 417, 418, *post*.

<sup>4</sup> Jennings, *op. cit.*, pp. 114 *et seq.*

enforced in the courts and those which are observed merely as a matter of convenient practice, it would be easier to accept the necessity for explaining obedience to the latter through their connection with the former. But no such clear line of distinction exists, once it is seen that the range of convention extends beyond the rules for securing the acceptance by Ministers of their responsibility to Parliament for the exercise of the royal prerogative. Ministerial responsibility has in practice superseded legal responsibility which was enforced by impeachment.<sup>1</sup> It was a natural line of reasoning for a lawyer to show that legal consequences might ensue from disregard of the usages by which ministerial responsibility had been established. Dicey took his strongest illustration from the rule which compels annual meetings of Parliament in order to pass the Appropriation and Finance Bills and to renew the operation of the Army and Air Force (Annual) Act. As one who was for many years, even while a Professor at Oxford, Counsel to the Commissioners of Inland Revenue, he was naturally attracted to this example, but he lived long enough to learn later that, if any inconvenience was suffered by the Commissioners on account of the tardiness of Parliament to reimpose a tax, the law could quickly be adjusted by statute in favour of the revenue.<sup>2</sup> Thus the usage of collecting a tax in advance of its authorisation by Parliament became part of the law. This was the only result of the Administration breaking the law; for

<sup>1</sup> Cf. pp. 326, 327, *post*.

<sup>2</sup> See *Bowles v. Bank of England* [1913] 1 Ch. 57; K. & L. 117, and the sequel to the case, the Provisional Collection of Taxes Act, 1913.

it can do this with impunity, since its majority in the Commons normally enables the passage of an Indemnity Bill through Parliament.

We have already said something of the wider field of conventions, of their extension over the whole range of governmental activity, of their all-important part in achieving Dominion autonomy without assistance from, and indeed in direct disregard of, the law until the enactment of the Statute of Westminster. Conventions which embody the measure of agreement reached at Imperial Conferences are normally implemented by governmental action and thereafter are regarded as binding. But they rest only upon the acceptance by the Governments concerned of the commitments undertaken by the Prime Ministers and other delegates. Resolutions of such conferences have no force. A change of Government may prevent their being implemented. There is no tribunal to decide such disputes as may arise about their meaning and application, much less to enforce such conventions. The proposal for an inter-Commonwealth tribunal discussed by the Imperial Conference, 1930,<sup>1</sup> has not as yet been adopted. Yet the basis of the Statute of Westminster rests upon the acceptance of constitutional practice established by such conventions, two of which are expressly recited in the preamble. Nor does s. 4 contain any mention of a sanction. It is supplementary of the convention in the preamble which it enacts as a rule of construction in that it provides that no Act of Parliament of the United Kingdom shall extend to a Dominion unless

<sup>1</sup> See Report, pp. 22-24 (1930, Cmd. 3717).

with the request and consent of the Dominion concerned.

We have already referred to the judicial recognition of conventions of this type by the Judicial Committee of the Privy Council in the *British Coal Corporation* case.<sup>1</sup>

Examples of the mingling of law and convention abound in the law and custom of Parliament. Some part of the law of Parliament is statutory; the law relating to representation in the House of Commons, *i.e.* the distribution of seats, the franchise, the secrecy of the ballot, is clearly part of the law of the constitution which may be enforced in the courts. But is it clear that the statutory limitation by the Parliament Act, 1911, of the powers of the House of Lords could ever be so enforced?<sup>2</sup> Or are these limitations any less a matter of law than others which are purely conventional, such as the rule which enables the Commons as a matter of privilege to resist amendment of financial Bills by the Lords, a rule which is not included in the Parliament Act? Such a rule is as binding upon the Lords as the statutory restriction of their power.

The Standing Orders of each House closely resemble law proper. They are definite rules enforced by the House and not, it is true, by an independent outside tribunal, but they are for the greater part treated as obligatory. They are in no sense rules which call for enforcement by the ordinary courts. One fundamental principle of British constitutional law which is enshrined in the constitution of every

<sup>1</sup> See Intro. p. c, *ante*.

<sup>2</sup> See Intro. p. cxxx, *ante*, and App. sec. vi, for text of Act.

Dominion is to be found in these Orders. The Standing Orders of the House of Commons relating to public money, among which are to be found the earliest and, for more than a century, the only orders made for the Commons for their self-government,<sup>1</sup> require that every motion which in any way creates a charge upon the public revenue must receive the recommendation of the Crown, *i.e.* be recommended by a Minister of the Crown, before it can be sanctioned by the House, and upon receipt of such recommendation from a Minister the matter must be adjourned to a future day and be referred to the consideration of a committee of the whole House before any resolution or vote of the House is passed.

The fact that in the United Kingdom this principle is conventional, while in each of the Dominions it is contained in the Constitution Act, does not mean that it is regarded as less fundamental here than it is in other parts of the British Commonwealth. It is a rule of constitutional law, not because it is part of the law of the land enforceable by the courts, but because it has proved its value over a long period and so become established by custom. It may be conceded that it would be easier to change the rule by amendment of Standing Orders than by amendment of the constitution of any of the Dominions. But since no Government could conceivably wish to wreck this corner-stone of its responsibility for the conduct of affairs, the principle is in fact as safely secured in the United Kingdom as it is as a rule of law in the Constitution Acts of the Dominions.

<sup>1</sup> May, *Parliamentary Practice* (13th ed., 1924), pp. 505-508. Standing Orders Nos. 66-71B. Nos. 66, 67 and 68 date from 1713, 1707 and 1715 respectively.



Lastly the positions of the Prime Minister and of his potential successor, the Leader of the Opposition, illustrate that conventions are part and parcel of constitutional law. It is true, as Jennings points out,<sup>1</sup> that the Prime Minister is mentioned only three times in the statute-book and that by this test he receives an emolument of £10,000 a year, the right to a pension, and the occupation of a country seat in return for performing the task of nominating members to sit on two councils for physical training; and that the Leader of the Opposition is legally non-existent except for the provision of his salary.<sup>2</sup> But the legislation is based upon the assumption that there is a Prime Minister and a Leader of the Opposition. It is merely pedantic to deny legal entity to the most important office in the Administration and to the Cabinet as such, when they have been in existence for over two hundred years.

Recognition of the impossibility of separating law and convention by any hard and fast line suggests that the distinction depends upon the meaning to be attached to the word "court,"<sup>3</sup> and that there is no necessary difference in their nature beyond the fact that there are institutions for the application of law and that there may be none for the application of conventions—or, at all events, none of a judicial

<sup>1</sup> Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 114-116.

<sup>2</sup> See Ministers of the Crown Act, 1937, which also provides increased salaries for members of the Cabinet, a purely conventional body. Chequers Estate Act, 1917; Physical Training and Recreation Act, 1937, s. 1 (1).

<sup>3</sup> Cf. Jennings, *op. cit.* (1st ed., 1933), p. 98. The passage does not appear in the 2nd edition, but the reasoning which supports it remains.

character. For the House of Commons enforces its Standing Orders just as Dominion Governments apply the conventions moulded by decisions of Imperial Conferences. Some conventions are indeed more precise in their terms than rules of law. This is true of some of the conventions which are the result of agreement reached at such conferences. Many others are of a vague character, which suggests a distinction between usages and conventions proper. There is, too, a borderline between law and convention where it is not clear to which category a rule belongs. It has already been asked on the one hand, what court can enforce the statutory duties of the Speaker under the Parliament Act with regard to money Bills? On the other hand, could a court refuse to recognise the validity of a State document because the sealing thereof departed from the traditional practice, which is regarded as legally necessary, though it is sanctioned by no statute or judge-made law?

The recognition that the dividing line is not clear suggests that Dicey may have been influenced too much by the Austinian view of law—the command of the Sovereign to be enforced as such. If it is clear that Dicey was following in the steps of Austin in being the first to apply the method of analysis to constitutional law, it is not difficult to appreciate why he deemed it necessary to explain obedience to conventions upon the same ground, namely, enforcement. But much law, perhaps all law, is obeyed because of the general acquiescence of the community in its content. It is questionable whether it is fear of the consequences which impels the

observance of law on the part of the bulk of the community. Indeed, if a law is regarded as unreasonable, it is often disregarded to such an extent that its enforcement by the ordinary methods becomes impossible. Why, then, need it be said that Cabinet Ministers obey conventions because disregard of them might bring them into conflict with the law? The Prime Minister to-day stands in no fear of impeachment, much less of an appearance at the Old Bailey or in the High Court, on account of his obligations to observe the rules of ministerial responsibility.

There are other dominant motives which secure obedience to those conventions which were examined by Dicey: (1) the desire to carry on the traditions of constitutional government; (2) the wish to keep the intricate machinery of the ship of State in working order; and (3) the anxiety to retain the confidence of the public, and with it office and power. These influences secure that the conventions of Cabinet government, which are based on binding precedents and convenient usage, are observed by successive generations of Ministers. The exact content of a convention may change, or even be reversed, but each departure from the previous practice is defended by those responsible as not violating the older precedents. Objections are only silenced when time has proved that the departure from precedent has created a new convention, or has shown itself to be a bad precedent and, therefore, constituted in itself a breach of convention. An illustration may make this clear. The Cabinet, when it formulated in 1932 the "agreement to differ" over the tariff

issue (Import Duties Bill), while remaining united on all other matters of national policy, broke with precedent which demanded that the Cabinet should speak with a unanimous voice, as being collectively responsible to the House of Commons.

The decision was made public in the following terms :

The Cabinet has had before it the Report of its Committee on the Balance of Trade, and after prolonged discussion it has been found impossible to reach a unanimous conclusion on the Committee's recommendations.

The Cabinet, however, is deeply impressed with the paramount importance of maintaining national unity in the presence of the grave problems now confronting this country and the whole world.

It has accordingly determined that some modification of usual Ministerial practice is required, and has decided that Ministers who find themselves unable to support the conclusions arrived at by the majority of their colleagues on the subject of import duties and cognate matters are to be at liberty to express their views by speech and vote.

The Cabinet being essentially united in all other matters of policy believe that by this special provision it is best interpreting the will of the nation and the needs of the time.

It is to be observed that the justification purported to be the belief that the Cabinet was best interpreting the will of the nation and the needs of the time. This is the ultimate justification for all conventions modifying or regulating the use of the prerogatives of government. The dissenting Ministers resigned after a few months on the cognate issue of Imperial preference. In the result the convention of Cabinet unanimity was reinforced. Had the experiment succeeded the convention

might have been modified if it had been followed by a series of similar decisions.

A second illustration is afforded by the convention which Dicey noted as new in his last Introduction—that which all but compels a Ministry to resign on defeat at a general election without waiting to meet Parliament. Four precedents occurring between 1868 and 1886 constituted a sufficient departure from the precedent set by Peel, who found himself in a minority after the general election in 1834, but resisted in Parliament the attempt to force him from office.<sup>1</sup> In this example a new usage emerged after several breaches of the old convention, and in due course the new precedents were treated as binding.

It should be pointed out that the argument that breaches of law would follow failure to observe conventions applies only to those conventions, or to most of them, which determine the relations between the Cabinet and the House of Commons. No breach of the law would ensue from the failure of the House of Commons to enforce its Standing Orders. Some of these are by agreement disregarded. Nor could such a result follow from the failure of a Government Department to consult organised interests in the framing of legislation; nor from the neglect of the Government of the United Kingdom to consult the Dominions upon a topic of Imperial interest; nor from the King inviting a peer to take office as Prime Minister and First Lord of the Treasury in breach of a recent usage. Consequences of greater or less moment would doubtless follow departure from established

<sup>1</sup> See Intro. pp. cxxv, cxxvi, *ante*.



practice in most cases. But in none could there result any consequence which could come before the courts for decision.

Dicey was absolutely right to include his analysis of constitution conventions, perhaps the most valuable part in the book. But he had imposed upon himself the limitation to exclude politics. Conventions are political expedients; therefore he had to connect them with law as enforced in the courts. Since he belonged to the school of thought which regarded obedience to an enforcing authority as of the essence of law, he solved his difficulty in the way he did. That this conception of obedience no longer explains the observance of the intricate mass of precepts, which furnish the key to an understanding of parliamentary government and the status of the British Commonwealth, does not lessen the debt which is owed to the author for his brilliant analysis of the nature of conventions.

#### (5) THE CROWN CAN DO NO WRONG

The development of the study of the constitution raises the question whether the three guiding principles which were formulated by Dicey ought to be supplemented. So far as law consists of rules applied by the courts (with this Dicey was in his own opinion exclusively concerned), there is one outstanding principle which distinguishes our constitutional law from that of other States. It is a principle, moreover, which owing its growth, as it does, to the history of the English Monarchy, is apt to puzzle the foreign student of our institutions. That "the King can

do no wrong" signifies to the lawyer that the King cannot be sued in his own courts. Neither against the Sovereign in respect of his personal acts, nor against the Crown, as representing a legal conception, the sum-total of prerogatives and other powers and rights of government, can an action lie or a prosecution be brought, save only in the few cases where Parliament has expressly so provided. It is true that the Crown does not embrace all the powers, even of the Central Government. For Ministers may exercise power in their own right, and not as representatives of the Crown. The procedure by Petition of Right, which lies generally for breach of contract and the recovery of property, though it does not enable a person in the service of the Crown to sue to enforce the terms of his employment nor provide a remedy in tortious injury, has mitigated the obvious hardship of the rule under modern conditions. Nor does this immunity extend to the local authorities or the independent boards which administer or control certain spheres of governmental activity. Nevertheless the doctrine is one which distinguishes the legal position of the Central Government of the United Kingdom, including the Colonial Administrations, and to a less extent those of the other members of the British Commonwealth and of British India, from that of other States. This is not the place to give a detailed account of proceedings against the Crown, nor to explain the peculiar advantages which the prerogative gives to the Crown as a plaintiff or prosecutor. The subject is dealt with in detail in every modern text-book on constitutional law. An attempt is made to explain

the immunities which protect the Government Departments and other authorities in the Note on English<sup>1</sup> administrative law which appears in the Appendix.

It is this legal doctrine that the Crown can do no wrong which necessitated the development of the political responsibility of the King's Ministers which is the basis of parliamentary government. Ministerial responsibility to-day is more vital to democratic government than the earlier and still extant rule of law which forbids a Minister or other servant of the Crown to claim personal immunity from suit on the plea of obedience to the command of a legally infallible Sovereign. The impeachment of Earl Danby<sup>2</sup> went a long way towards establishing the legal responsibility of Ministers. But the irresponsibility of the Cabinet was not to be controlled by impeachment or other legal means. With the political devices the lawyer, accepting Dicey's own limitation of his province, is not concerned, except to explain that ministerial responsibility to the Commons has caused the legal weapon of impeachment to fall into disuse. But he is concerned to explain, particularly to the student of other constitutions, the scope of the immunity which English administrative law confers upon officials by reason of the retention of the rule, the Crown can do no wrong.

The rule has this justification, if so it be regarded : successful litigation against a Government Department is rendered difficult and is virtually confined

<sup>1</sup> The position of the Crown in Scots Law is less favoured.

<sup>2</sup> (1679) St. Tr. 599.

to the exceptional process by petition of right which is only available in the High Court. Were the rule in particular which prohibits an action for tort abolished there is some danger that the inevitably large resources of the public purse would tempt litigants to claim, and juries to award, damages against the Crown on an extravagant scale. The risk of unscrupulous claims could be met by requiring plaintiffs in appropriate circumstances to be determined by the court to give security for costs, but the generosity of juries in awarding heavy damages against wealthy corporate bodies is well known to lawyers. The argument is not conclusive, but it seems to have impressed successive Governments. So far all efforts to abolish the prerogative immunity of the Crown as a doctrine of English constitutional law have failed, though some minor amendments of the law on its procedural side have been made. It is more in accordance with the high traditions of the public service to explain official opposition to the Crown Proceedings Bill, 1927, on this ground rather than on that of self-interest.<sup>1</sup> Meanwhile the legal infallibility of the Crown remains one of the principles of our constitutional law. It is, however, a principle which has been abandoned in some parts of the British Empire. For example, both in the Commonwealth of Australia and the State of Victoria proceedings against the Crown have been assimilated to a large extent to proceedings between subject and subject. In particular the Crown in right of the Commonwealth is liable in tort as well as in contract: Judiciary Act, 1903; *Baume v. Common-*

<sup>1</sup> See App. sec. i (6) (B).

*wealth*.<sup>1</sup> It is necessary to show that the relation between the Commonwealth and its officer is such that according to the ordinary principles of law the maxim *respondeat superior* would apply.

Section 176 (1) of the Government of India Act, 1935, provides that the Federation (when set up) and a Provincial Government may sue and be sued in relation to their respective affairs in the like cases as the Secretary of State in Council could previously have been sued. The Secretary of State in Council was liable as successor to the East India Company and as such could claim no special immunity by reason of acting for the Crown. Broadly speaking this involves liability to be sued in regard to all claims for which a private individual or a trading corporation can be sued, or for which specific statutory provision has been made. Thus the Secretary of State in Council could be sued, as now may be the Provincial Governments, in respect of acts for which the Crown as such would not be liable. In *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*<sup>2</sup> it was held that there was liability for damages occasioned by the negligence of servants in the service of the Government of India, if the negligence was such as would render an ordinary employer liable. But it is clear that no suits would have lain against the East India Company, and therefore not against its successors to-day, for acts of State. There is, however, a class of acts which no private individual or trading corporation could have accomplished. For these, so far as they fall within their

<sup>1</sup> [1906] 4 C.L.R. 97, esp. at p. 106.

<sup>2</sup> (1861) 2 Bourke, 166.



sphere, the Governments of the Provinces are now liable. In other words, liability extends to all wrongful acts which are not covered by the narrow meaning which the courts apply to the true act of State,<sup>1</sup> whether or not they be acts which could have been done by a private individual or trading corporation. For none of these matters can a petition of right lie, since the liability must be met out of the revenues of India, not out of those of the United Kingdom.

### (6) CONCLUSION

The supreme merit of this book lies in the author's application of the analytic method to constitutional law. An analysis inevitably leads to conclusions. In this case there resulted the deduction of certain guiding principles expressed in terms which seemed to admit of little doubt. The method has some disadvantages over the descriptive account of legal institutions. Bagehot in *The English Constitution* gave the world a description of Cabinet Government as he saw it in operation in the middle of the nineteenth century. That description is of abiding value to the historian and did much to make clear the relation of the Cabinet to the Crown and Parliament at that particular time. Jennings in *Cabinet Government* has surveyed the field for a hundred years and connected up the Cabinet of Bagehot's day, and earlier, with the present-day Administration. Dicey's task was more ambitious. In his search for principles he endeavoured to frame an explanation of those laws of the constitution which might be regarded as

<sup>1</sup> Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 87-91.

fundamental. It is easy to-day to criticise the limited field of government which was covered. The text-books of constitutional law in 1885 (and the same is true of some modern books) still concentrated on the Crown, Parliament and the courts. Too little attention had been paid to the widening field of administrative government. Local government found no place. This seems to the modern reader a remarkable omission. The great Public Health Act, 1875, had been on the statute-book for ten years ; the Municipal Corporations Act, 1882, had lately been enacted and already the proposals which found fruit in the Local Government Acts of 1888 and 1894 were being discussed. The growth of conventions in the colonial sphere passed unheeded, even by such writers on the British constitution as Anson. A study of the statute-book was later to lead Dicey to discover how the conception of the function of government was altering, but this was not until the new century when *Law and Opinion* made its appearance.

There is then less need to conclude by apologising for the limitations of the *Law of the Constitution* than by making some estimation of their application to-day.

*Sovereignty of Parliament.*—The legal rule that Parliament is supreme is not denied by any one ; it is unquestioned by the courts and is accepted by the Administration. The political supremacy of the electorate is still acknowledged as a limitation upon the exercise of legislative power, though a lawyer can claim no special qualification to say precisely how political power is exercised. The power of the

electorate is qualified by the recognition of the increased power of the Cabinet, which is able to utilise the power entrusted to it by the electorate to change the law at its will. But every Government is disposed to keep its ear to the ground to detect electoral rumblings. In other words, there is a change of emphasis. It is the Cabinet system which is fundamental to parliamentary government. That system depends for its efficiency as an instrument of government upon being able to use the legal supremacy of Parliament (or rather of the Commons) to serve its ends ; it is saved from being an autocratic instrument by the knowledge that at intervals the electorate may alter the composition of the Commons and so place the supremacy of Parliament in other hands. But it is the political supremacy rather than the legal doctrine which saves the democratic principle.<sup>1</sup> Indeed the legal instrument of parliamentary supremacy stands in some risk of actually facilitating the creation of an extreme form of government at the present time, since any change, however fundamental, can be accomplished in law by an ordinary enactment of Parliament.

*Rule of Law.*—The changed conception of liberty narrows the field for the application of the rule of law in the sense of affording the protection of the common law against the Crown, its Ministers and the other organs of administrative government, central, local or independent. The courts still restrict excesses of the prerogative so far as illegal arbitrary

<sup>1</sup> See also Intro., under "Parliamentary Sovereignty and Federalism," pp. lvi *et seq.*, *ante*.

action against the individual subject is concerned. But it is the political control exercised through the House of Commons which grows more important as the enacted law extends the legal powers of government. Power which is conferred by statute cannot be arbitrary; for the courts may not declare illegal what Parliament has said is law, however much it may restrict the freedom of individuals. But there is a sphere where so far Parliament has tampered but little in the direction of restriction. Freedom of speech and freedom of association are as essential to democracy as freedom of person. For without them criticism of political institutions and social conditions is impossible. The present threat to the first two of these is discussed elsewhere.<sup>1</sup> For it is clear that Parliament could impose restrictions on freedom of speech, just as it has regulated the liberty of the individual to deal with his property as he chooses. But freedom of person still finds its bulwark in the common law, buttressed by the writ of habeas corpus against the Administration. It is in this connection that Dicey's conception of the rule of law operates to-day, notwithstanding that its implications so far as they rest upon the present state of the law are open to grave doubt and in some respects have been shown to be inaccurate in this sphere. It has played, and still plays, its part in strengthening the tradition of political liberty which is the foundation of our parliamentary government. Public opinion is as ready as ever to resist encroachments proposed to Parlia-

<sup>1</sup> Appendix, sec. ii; Law of Public Meetings and Liberty of Discussion; and ch. vi and vii. *post.*

ment by Governments who are embarrassed by their critics.

That public opinion to-day is influenced by Dicey's exposition of the opposition of the common law to inroads upon individual liberty may be evidenced by the storm of criticism which greets every extension of administrative law. This is not entirely due to distrust of the official, for the unbiassed must admit that the standard of the higher ranks of the Civil Service is above reproach. There is still a strong affection for the emphasis upon individual liberty which cannot be attributed to purely selfish motives. The owners of coal are unable to resist the vesting of mineral rights in the State, but colliery proprietors can conduct a successful agitation against the compulsory amalgamation of their undertakings by appealing to the doctrine of *laissez faire*. Proposals, far milder than the existing law, for checking the dissemination of political propaganda among the armed forces, were greeted by arguments founded upon the rule of law as well by those of the Left who feared the growth of fascism as by lifelong supporters of the Right, when the Incitement to Disaffection Bill was before Parliament in 1934. Effective action against shirted organisations was long delayed, despite the grievous inconveniences caused by their activities to the peaceful inhabitants of populous districts. For public opinion was loath to admit the need for increasing the powers of the police. The Public Order Bill received a scrutiny from all quarters of the House of Commons in 1936, which contrasted favourably with the attention given to Bills of greater importance. It is to Dicey



that the politician as well as the lawyer turns whenever a threat to individual liberty is proposed. Largely to him is owed the insistence upon careful safeguards which make government regulation much more tolerable than it is in other States where the individual is subordinated to national ends.

*Conventions of the Constitution.*—The reason why conventions are obeyed may be obscure, just as their actual operation is a mystery too deep to be fathomed by the lawyer. But the fact that Cabinet Government and indeed the whole administrative machine only function effectively by these means must be acknowledged. The cohesion of the British Commonwealth depends upon them. In their application to Cabinet Government Dicey was the first constitutional lawyer to analyse their nature. His was, indeed, a magnificent contribution to our public law, if only because it led to the recognition that conventions are indispensable to an understanding of our legal institutions. Conventions are indeed part and parcel of constitutional law. With the widening of the scope of conventions there has come the realisation that the dividing line between law and convention is by no means clear. Nor can the observance of rules of a conventional character be always, or even usually, explained by reference to the ultimate sanction of law enforced in courts of justice.

## OUTLINE OF SUBJECT

## NOTE

BY THE EDITOR

THE text remains in the form in which it appeared in the seventh edition published in 1908. This was the edition in which the Author finally settled the text.

The footnote references which show the authorities upon which the Author relied are also preserved. But a few additions to the notes have been made, particularly where there has been a change in the law, in order to avoid giving the impression, which is perhaps inevitable in the case of published lectures, that the statements in the text refer to the present day.

No attempt has been made to remove certain typographical inconsistencies, as it has been thought preferable to reproduce as closely as possible the actual text printed as it last passed the scrutiny of Professor Dicey.



## OUTLINE OF SUBJECT

### THE TRUE NATURE OF CONSTITUTIONAL LAW

"GREAT critics," writes Burke in 1791, "have taught us one essential rule. . . . It is this, that if ever we should find ourselves disposed not to admire those writers or artists, Livy and Virgil for instance, Raphael or Michael Angelo, whom all the learned had admired, not to follow our own fancies, but to study them until we know how and what we ought to admire; and if we cannot arrive at this combination of admiration with knowledge, rather to believe that we are dull, than that the rest of the world has been imposed on. It is as good a rule, at least, with regard to this admired constitution (of England). We ought to understand it according to our measure; and to venerate where we are not able presently to comprehend."<sup>1</sup>

Optimistic view of English constitution.

"No unbiassed observer," writes Hallam in 1818, "who derives pleasure from the welfare of his species, can fail to consider the long and uninterruptedly increasing prosperity of England as the most beautiful phænomenon in the history of mankind. Climates more propitious may impart more largely the mere enjoyments of existence; but in no other region have

<sup>1</sup> *The Works of Edmund Burke* (1872 ed.), vol. iii, p. 114.

“the benefits that political institutions can confer been  
 “diffused over so extended a population ; nor have any  
 “people so well reconciled the discordant elements of  
 “wealth, order, and liberty. These advantages are  
 “surely not owing to the soil of this island, nor to the  
 “latitude in which it is placed ; but to the spirit of its  
 “laws, from which, through various means, the characteristic  
 “independence and industriousness of our  
 “nation have been derived. The constitution, therefore,  
 “of England must be to inquisitive men of all  
 “countries, far more to ourselves, an object of superior  
 “interest ; distinguished, especially, as it is from all  
 “free governments of powerful nations, which history  
 “has recorded, by its manifesting, after the lapse of  
 “several centuries, not merely no symptom of irretrievable  
 “decay, but a more expansive energy.”<sup>1</sup>

These two quotations from authors of equal though of utterly different celebrity, recall with singular fidelity the spirit with which our grandfathers and our fathers looked upon the institutions of their country. The constitution was to them, in the quaint language of George the Third, “the most perfect of human formations”;<sup>2</sup> it was to them not a mere polity to be compared with the government of any other state, but so to speak a sacred mystery of statesmanship ; it “had (as we have all heard from our youth up) not been made but had grown” ; it was the fruit not of abstract theory but of that instinct which (it is supposed) has enabled Englishmen, and especially un-

<sup>1</sup> Hallam, *Middle Ages* (12th ed., 1860), vol. ii, p. 267. Nothing gives a more vivid idea of English sentiment with regard to the constitution towards the end of the eighteenth century than the satirical picture of national pride to be found in Goldsmith, *The Citizen of the World*, Letter iv.

<sup>2</sup> Stanhope, *Life of Pitt* (2nd ed., 1862), vol. i, App. p. x.



civilised Englishmen, to build up sound and lasting institutions, much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtly wrought than any work of conscious art. The constitution was marked by more than one transcendent quality which in the eyes of our fathers raised it far above the imitations, counterfeits, or parodies, which have been set up during the last hundred years throughout the civilised world; no precise date could be named as the day of its birth; no definite body of persons could claim to be its creators, no one could point to the document which contained its clauses; it was in short a thing by itself, which Englishmen and foreigners alike should "venerate, where they are not able presently to comprehend."

The present generation must of necessity look on the constitution in a spirit different from the sentiment either of 1791 or of 1818. We cannot share the religious enthusiasm of Burke, raised, as it was, to the temper of fanatical adoration by just hatred of those "doctors of the modern school," who, when he wrote, were renewing the rule of barbarism in the form of the reign of terror; we cannot exactly echo the fervent self-complacency of Hallam, natural as it was to an Englishman who saw the institutions of England standing and flourishing, at a time when the attempts of foreign reformers to combine freedom with order had ended in ruin. At the present day students of the constitution wish neither to criticise, nor to venerate, but to understand; and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of

Modern  
view of  
constitution.

an expounder; his duty is neither to attack nor to defend the constitution, but simply to explain its laws. He must also feel that, however attractive be the mysteries of the constitution, he has good reason to envy professors who belong to countries, such as France, Belgium, or the United States, endowed with constitutions of which the terms are to be found in printed documents, known to all citizens and accessible to every man who is able to read. Whatever may be the advantages of a so-called "unwritten" constitution, its existence imposes special difficulties on teachers bound to expound its provisions. Any one will see that this is so who compares for a moment the position of writers, such as Kent or Story, who commented on the constitution of America, with the situation of any person who undertakes to give instruction in the constitutional law of England.<sup>1</sup>

Special  
difficulty of  
comment-  
ing on  
English  
constitu-  
tion.

When these distinguished jurists delivered, in the form of lectures, commentaries upon the constitution of the United States, they knew precisely what was the subject of their teaching and what was the proper mode of dealing with it. The theme of their teaching was a definite assignable part of the law of their country; it was recorded in a given document to which all the world had access, namely, "the constitution of the United States established and ordained by the People of the United States." The articles of this constitution fall indeed far short of perfect logical arrangement, and lack absolute lucidity of expression; but they contain, in a clear and intelligible form,

<sup>1</sup> There is still in 1938 no constitutional code for the United Kingdom, but a large part of public law is now contained in Acts of Parliament and Statutory Rules and Orders.—ED.

the fundamental law of the Union. This law (be it noted) is made and can only be altered or repealed in a way different from the method by which other enactments are made or altered; it stands forth, therefore, as a separate subject for study; it deals with the legislature, the executive, and the judiciary, and, by its provisions for its own amendment, indirectly defines the body in which resides the legislative sovereignty of the United States. Story and Kent therefore knew with precision the nature and limits of the department of law on which they intended to comment; they knew also what was the method required for the treatment of their topic. Their task as commentators on the constitution was in kind exactly similar to the task of commenting on any other branch of American jurisprudence. The American lawyer has to ascertain the meaning of the articles of the constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammar, by his knowledge of the common law, by the light (occasionally) thrown on American legislation by American history, and by the conclusions to be deduced from a careful study of judicial decisions. The task, in short, which lay before the great American commentators was the explanation of a definite legal document in accordance with the received canons of legal interpretation. Their work, difficult as it might prove, was work of the kind to which lawyers are accustomed, and could be achieved by the use of ordinary legal methods. Story and Kent indeed were men of extraordinary capacity; so, however, were our own Blackstone, and at least one of Blackstone's editors. If, as

is undoubtedly the case, the American jurists have produced commentaries on the constitution of the United States utterly unlike, and, one must in truth add, vastly superior to, any commentaries on the constitutional law of England, their success is partly due to the possession of advantages denied to the English commentator or lecturer. His position is entirely different from that of his American rivals. He may search the statute-book from beginning to end, but he will find no enactment which purports to contain the articles of the constitution; he will not possess any test by which to discriminate laws which are constitutional or fundamental from ordinary enactments; he will discover that the very term "constitutional law," which is not (unless my memory deceives me) ever employed by Blackstone, is of comparatively modern origin; and in short, that before commenting on the law of the constitution he must make up his mind what is the nature and the extent of English constitutional law.<sup>1, 2</sup>

His natural, his inevitable resource is to recur to writers of authority on the law, the history, or the practice of the constitution. He will find (it must

<sup>1</sup> See this point brought out with great clearness by Monsieur Boutmy, *Etudes de Droit constitutionnel* (2nd ed., 1888), p. 8, English translation by E. M. Dicey (1891), p. 8. Monsieur Boutmy well points out that the sources of English constitutional law may be considered fourfold, namely—(1) Treaties or Quasi-Treaties, i.e. the Acts of Union; (2) The Common Law; (3) Solemn Agreements (pacts), e.g. the Bill of Rights; (4) Statutes. This mode of division is not exactly that which would be naturally adopted by an English writer, but it calls attention to distinctions often overlooked between the different sources of English constitutional law.

<sup>2</sup> In 1938 conventions would certainly be included as a source of constitutional law and emphasis would be placed upon the fact that administrative law as part of constitutional law is almost exclusively derived from statute law.—ED.

Commentator seeks help from constitutional lawyers, constitutional historians and constitutional theorists.

be admitted) no lack of distinguished guides ; he may avail himself of the works of lawyers, such as Blackstone, of the investigations of historians, such as Hallam or Freeman, and of the speculations of philosophical theorists, such as Bagehot or Hearn. From each class he may learn much, but for reasons which I am about to lay before you for consideration, he is liable to be led by each class of authors somewhat astray in his attempt to ascertain the field of his labours and the mode of working it ; he will find, unless he can obtain some clue to guide his steps, that the whole province of so-called "constitutional law" is a sort of maze in which the wanderer is perplexed by unreality, by antiquarianism, and by conventionalism.

Let us turn first to the lawyers, and as in duty bound to Blackstone.

Of constitutional law as such there is not a word to be found in his *Commentaries*. The matters which appear to belong to it are dealt with by him in the main under the head Rights of Persons. The Book which is thus entitled treats (*inter alia*) of the Parliament, of the King and his title, of master and servant, of husband and wife, of parent and child. The arrangement is curious and certainly does not bring into view the true scope or character of constitutional law. This, however, is a trifle. The Book contains much real learning about our system of government. Its true defect is the hopeless confusion, both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit—common to all the lawyers of his time—of applying old and inapplicable terms to new institu-

I. Law-  
yer's view  
of con-  
stitution.  
Its un-  
reality.  
Black-  
stone.



tions, and especially of ascribing in words to a modern and constitutional King the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror.

"We are next," writes Blackstone, "to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The King of England is, therefore, not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him; in like manner as, upon the great revolution of the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new Emperor: so that, as Gravina expresses it, *in ejus unius persona veteris reipublicae vis atque majestas per cumulatam magistratuum potestates exprimebatur.*"<sup>1</sup>

The language of this passage is impressive; it stands curtailed but in substance unaltered in Stephen's *Commentaries*.<sup>2</sup> It has but one fault; the

<sup>1</sup> 1 BL, *Comm.* p. 250.

<sup>2</sup> 14th ed., 1903, vol. ii, p. 490. This work has since been re-written on two occasions, and is now in its twentieth edition.—ED.

statements it contains are the direct opposite of the truth. The Executive of England is in fact placed in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that one person is not the King, but the chairman of the committee, known as the Prime Minister. Nor can it be urged that Blackstone's description of the royal authority was a true account of the powers of the King at the time when Blackstone wrote. George the Third enjoyed far more real authority than has fallen to the share of any of his descendants. But it would be absurd to maintain that the language I have cited painted his true position. The terms used by the commentator were, when he used them, unreal, and known<sup>1</sup> to be so. They have become only a little more unreal during the cen-

<sup>1</sup> Paley, *Moral Philosophy* (1785), Book vi, ch. vii. "In the British, and possibly in all other constitutions, there exists a wide difference between the actual state of the government and the theory. The one results from the other; but still they are different. When we contemplate the *theory* of the British government, we see the King invested with the most absolute personal impunity; with a power of rejecting laws, which have been resolved upon by both Houses of Parliament; of conferring by his charter, upon any set or succession of men he pleases, the privilege of sending representatives into one House of Parliament, as by his immediate appointment he can place whom he will in the other. What is this, a foreigner might ask, but a more circuitous despotism? Yet, when we turn our attention from the legal existence to the actual exercise of royal authority in England, we see these formidable prerogatives dwindled into mere ceremonies; and in their stead, a sure and commanding influence, of which the constitution, it seems, is totally ignorant, growing out of that enormous patronage, which the increased extent and opulence of the Empire has placed in the disposal of the executive magistrate." Paley sees far more clearly into the true nature of the then existing constitution than did Blackstone. It is further noticeable that in 1785 the power to create Parliamentary boroughs was still looked upon as in theory an existing prerogative of the Crown. The power of the Crown was still large, and rested in fact upon the possession of enormous patronage.

ture and more which has since elapsed. "The King," he writes again, "is considered in domestic affairs . . . "as the fountain of justice, and general conservator "of the peace of the kingdom. . . . He therefore "has alone the right of erecting courts of judicature: "for, though the constitution of the kingdom hath entrusted him with the whole executive power of the "laws, it is impossible, as well as improper, that he "should personally carry into execution this great and "extensive trust: it is consequently necessary, that "courts should be erected to assist him in executing this "power; and equally necessary, that if erected, they "should be erected by his authority. And hence it is, "that all jurisdictions of courts are either mediately "or immediately derived from the Crown, their proceedings run generally in the King's name, they pass "under his seal, and are executed by his officers."<sup>1</sup> Here we are in the midst of unrealities or fictions. Neither the King nor the Executive has anything to do with erecting courts of justice. We should rightly conclude that the whole Cabinet had gone mad if to-morrow's Gazette contained an order in council not authorised by statute erecting a new Court of Appeal. It is worth while here to note what is the true injury to the study of law produced by the tendency of Blackstone, and other less famous constitutionalists, to adhere to unreal expressions. The evil is not merely or mainly that these expressions exaggerate the power of the Crown. For such conventional exaggeration a reader could make allowance, as easily as we do for ceremonious terms of respect or of social

<sup>1</sup> 1 Bl., *Comm.* pp. 266, 267.

courtesy. The harm wrought is, that unreal language obscures or conceals the true extent of the powers, both of the King and of the Government. No one, indeed, but a child, fancies that the King sits crowned on his throne at Westminster, and in his own person administers justice to his subjects. But the idea entertained by many educated men that an English King or Queen reigns without taking any part in the government of the country, is not less far from the truth than the notion that Edward VII ever exercises judicial powers in what are called his courts. The oddity of the thing is that to most Englishmen the extent of the authority actually exercised by the Crown—and the same remark applies (in a great measure) to the authority exercised by the Prime Minister and other high officials—is a matter of conjecture. We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the facts of constitutional government and the more or less artificial phraseology under which they are concealed. Thus to say that the King appoints the Ministry is untrue; it is also, of course, untrue to say that he creates courts of justice; but these two untrue statements each bear a very different relation to actual facts. Moreover, of the powers ascribed to the Crown, some are in reality exercised by the Government, whilst others do not in truth belong either to the King or to the Ministry. The general result is that the true position of the Crown as also the true powers of the Government are concealed under the fictitious ascription to the sovereign of

political omnipotence, and the reader of, say, the first Book of Blackstone, can hardly discern the facts of law with which it is filled under the unrealities of the language in which these facts find expression.

II. Historian's view of constitution. Its antiquarianism.

Let us turn from the formalism of lawyers to the truthfulness of our constitutional historians.

Here a student or professor troubled about the nature of constitutional law finds himself surrounded by a crowd of eminent instructors. He may avail himself of the impartiality of Hallam: he may dive into the exhaustless erudition of the Bishop of Oxford:<sup>1</sup> he will discover infinite parliamentary experience in the pages of Sir Thomas May,<sup>2</sup> and vigorous common sense, combined with polemical research, in Mr. Freeman's *Growth of the English Constitution*. Let us take this book as an excellent type of historical constitutionalism. The *Growth of the English Constitution* is known to every one. Of its recognised merits, of its clearness, of its accuracy, of its force, it were useless and impertinent to say much to students who know, or ought to know, every line of the book from beginning to end. One point, however, deserves especial notice. Mr. Freeman's highest merit is his unrivalled faculty for bringing every matter under discussion to a clear issue. He challenges his readers to assent or deny. If you deny, you must show good cause for your denial, and hence may learn fully as much from rational disagreement with our author as from unhesitating assent to his views. Take, then, the *Growth of the English Constitution* as a first-rate

<sup>1</sup> Dr. William Stubbs, author of *Constitutional History of England, Select Charters*, and numerous other works.

<sup>2</sup> Sir Thomas Erskine May (later Lord Farnborough), author of *Constitutional History of England, 1760-1860*, and *Parliamentary Practice*.



specimen of the mode in which an historian looks at the constitution. What is it that a lawyer, whose object is to acquire the knowledge of law, will learn from its pages? A few citations from the ample and excellent head notes to the first two chapters of the work answer the inquiry.

They run thus:—

*The Landsgemeinden of Uri and Appenzell; their bearing on English Constitutional History; political elements common to the whole Teutonic race; monarchic, aristocratic, and democratic elements to be found from the beginning; the three classes of men, the noble, the common freeman, and the slave; universal prevalence of slavery; the Teutonic institutions common to the whole Aryan family; witness of Homer; description of the German Assemblies by Tacitus; continuity of English institutions; English nationality assumed; Teutonic institutions brought into Britain by the English conquerors; effects of the settlement on the conquerors; probable increase of slavery; Earls and Churls; growth of the kingly power; nature of kingship; special sanctity of the King; immemorial distinction between Kings and Ealdormen. . . . Gradual growth of the English constitution; new laws seldom called for; importance of precedent; return to early principles in modern legislation; shrinking up of the ancient national Assemblies; constitution of the Witenagemót; the Witenagemót continued in the House of Lords; Gemóts after the Norman Conquest; the King's right of summons; Life Peerages; origin of the House of Commons; comparison of English and French national Assemblies; of English and French history*

*generally ; course of events influenced by particular men ; Simon of Montfort . . . Edward the First ; the constitution finally completed under him ; nature of later changes ; difference between English and continental legislatures.*

All this is interesting, erudite, full of historical importance, and thoroughly in its place in a book concerned solely with the "growth" of the constitution ; but in regard to English law and the law of the constitution, the *Landesgemeinden* of Uri, the witness of Homer, the ealdormen, the constitution of the Witenagemót, and a lot more of fascinating matter are mere antiquarianism. Let no one suppose that to say this is to deny the relation between history and law. It were far better, as things now stand, to be charged with heresy, than to fall under the suspicion of lacking historical-mindedness, or of questioning the universal validity of the historical method. What one may assert without incurring the risk of such crushing imputations is, that the kind of constitutional history which consists in researches into the antiquities of English institutions, has no direct bearing on the rules of constitutional law in the sense in which these rules can become the subject of legal comment. Let us eagerly learn all that is known, and still more eagerly all that is not known, about the Witenagemót. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law of England was yesterday, still less what it was centuries ago, or what it ought to be to-morrow, but to know and be able to state what are the principles of law which actually and at the present day exist in

England. For this purpose it boots nothing to know the nature of the *Landesgemeinden* of Uri, or to understand, if it be understandable, the constitution of the *Witenagemót*. All this is for a lawyer's purposes simple antiquarianism. It throws as much light on the constitution of the United States as upon the constitution of England; that is, it throws from a legal point of view no light upon either the one or the other.

The name of the United States serves well to remind us of the true relation between constitutional historians and legal constitutionalists. They are each concerned with the constitution, but from a different aspect. An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. He is deeply, sometimes excessively, concerned with the question of "origins." He is but indirectly concerned in ascertaining what are the rules of the constitution in the year 1908. To a lawyer, on the other hand, the primary object of study is the law as it now stands; he is only secondarily occupied with ascertaining how it came into existence. This is absolutely clear if we compare the position of an American historian with the position of an American jurist. The historian of the American Union would not commence his researches at the year 1789; he would have a good deal to say about Colonial history and about the institutions of England; he might, for aught I know, find himself impelled to go back to the *Witenagemót*; he would, one may suspect, pause in his researches considerably short of Uri. A lawyer lecturing on the constitution of the United States would, on the other hand, neces-

Contrast  
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historical  
view of con-  
stitution.

sarily start from the constitution itself. But he would soon see that the articles of the constitution required a knowledge of the Articles of Confederation ; that the opinions of Washington, of Hamilton, and generally of the "Fathers," as one sometimes hears them called in America, threw light on the meaning of various constitutional articles ; and further, that the meaning of the constitution could not be adequately understood by any one who did not take into account the situation of the colonies before the separation from England and the rules of common law, as well as the general conceptions of law and justice inherited by English colonists from their English forefathers. As it is with the American lawyer compared with the American historian, so it is with the English lawyer as compared with the English historian. Hence, even where lawyers are concerned, as they frequently must be, with the development of our institutions, arises a further difference between the historical and the legal view of the constitution. Historians in their devotion to the earliest phases of ascertainable history are infected with a love which, in the eyes of a lawyer, appears inordinate, for the germs of our institutions, and seem to care little about their later developments. Mr. Freeman gives but one-third of his book to anything as modern as the days of the Stuarts. The period of now more than two centuries which has elapsed since what used to be called the "Glorious Revolution," filled as those two centuries are with change and with growth, seems hardly to have attracted the attention of a writer whom lack, not of knowledge, but of will has alone prevented from sketching out the annals of our modern constitution. A lawyer must look at

the matter differently. It is from the later annals of England he derives most help in the study of existing law. What we might have obtained from Dr. Stubbs, had he not surrendered to the Episcopate gifts which we hoped were dedicated to the University alone, is now left to conjecture. But, things being as they are, the historian who most nearly meets the wants of lawyers is Mr. Gardiner. The struggles of the seventeenth century, the conflict between James and Coke, Bacon's theory of the prerogative, Charles's effort to substitute the personal will of Charles Stuart for the legal will of the King of England, are all matters which touch not remotely upon the problems of actual law. A knowledge of these things guards us, at any rate, from the illusion, for illusion it must be termed, that modern constitutional freedom has been established by an astounding method of retrogressive progress; that every step towards civilisation has been a step backwards towards the simple wisdom of our uncultured ancestors. The assumption which underlies this view, namely, that there existed among our Saxon forefathers a more or less perfect polity, conceals the truth both of law and of history. To ask how a mass of legal subtleties "would have looked . . . in the eyes of a man who had borne his part in the elections of Eadward and of Harold, and who had raised his voice and clashed his arms in the great Assembly which restored Godwine to his lands,"<sup>1</sup> is to put an inquiry which involves an untenable assumption; it is like asking what a Cherokee Indian would have thought of the claim of George the Third to separate taxation from representation. In

<sup>1</sup> See Freeman, *Growth of the English Constitution* (1st ed., 1872), p. 125.



each case the question implies that the simplicity of a savage enables him to solve with fairness a problem of which he cannot understand the terms. Civilisation may rise above, but barbarism sinks below the level of legal fictions, and our respectable Saxon ancestors were, as compared, not with ourselves only, but with men so like ourselves as Coke and Hale, respectable barbarians. The supposition, moreover, that the cunning of lawyers has by the invention of legal fictions corrupted the fair simplicity of our original constitution, underrates the statesmanship of lawyers as much as it overrates the merits of early society. The fictions of the courts have in the hands of lawyers such as Coke served the cause both of justice and of freedom, and served it when it could have been defended by no other weapons. For there are social conditions under which legal fictions or subtleties afford the sole means of establishing that rule of equal and settled law which is the true basis of English civilisation. Nothing can be more pedantic, nothing more artificial, nothing more unhistorical, than the reasoning by which Coke induced or compelled James to forego the attempt to withdraw cases from the courts for his Majesty's personal determination.<sup>1</sup> But no achievement of sound argument, or stroke of enlightened statesmanship, ever established a rule more essential to the very existence of the constitution than the principle enforced by the obstinacy and the fallacies of the great Chief Justice. Oddly enough, the notion of an ideal constitution corrupted by the technicalities of lawyers is at bottom a delusion of the legal imagination. The idea of

<sup>1</sup> *Prohibitions del Roy* (1607) 12 Co. Rep. 63; K. & L. 276; Hearn, *Government of England* (2nd ed., 1887), ch. iii.

retrogressive progress is merely one form of the appeal to precedent. This appeal has made its appearance at every crisis in the history of England, and indeed no one has stated so forcibly as my friend Mr. Freeman himself the peculiarity of all English efforts to extend the liberties of the country, namely, that these attempts at innovation have always assumed the form of an appeal to pre-existing rights. But the appeal to precedent is in the law courts merely a useful fiction by which judicial decision conceals its transformation into judicial legislation; and a fiction is none the less a fiction because it has emerged from the courts into the field of politics or of history. Here, then, the astuteness of lawyers has imposed upon the simplicity of historians. Formalism and antiquarianism have, so to speak, joined hands; they have united to mislead students in search for the law of the constitution.

Let us turn now to the political theorists.

No better types of such thinkers can be taken than Bagehot and Professor Hearn. No author of modern times (it may be confidently asserted) has done so much to elucidate the intricate workings of English government as Bagehot. His *English Constitution* is so full of brightness, originality, and wit, that few students notice how full it is also of knowledge, of wisdom, and of insight. The slight touches, for example, by which Bagehot paints the reality of Cabinet government, are so amusing as to make a reader forget that Bagehot was the first author who explained in accordance with actual fact the true nature of the Cabinet and its real relation to the Crown and to Parliament. He is, in short, one of

III. View of political theorists. Its defect that it deals solely with conventions of constitution.

those rare teachers who have explained intricate matters with such complete clearness, as to make the public forget that what is now so clear ever needed explanation. Professor Hearn may perhaps be counted an anticipator of Bagehot. In any case he too has approached English institutions from a new point of view, and has looked at them in a fresh light; he would be universally recognised among us as one of the most distinguished and ingenious exponents of the mysteries of the English constitution, had it not been for the fact that he made his fame as a professor, not in any of the seats of learning in the United Kingdom, but in the University of Melbourne. From both these writers we expect to learn, and do learn much, but, as in the case of Mr. Freeman, though we learn much from our teacher which is of value, we do not learn precisely what as lawyers we are in search of. The truth is that both Bagehot and Professor Hearn deal and mean to deal mainly with political understandings or conventions and not with rules of law. What is the precise moral influence which might be exerted by a wise constitutional monarch; what are the circumstances under which a Minister is entitled to dissolve Parliament; whether the simultaneous creation of a large number of Peers for a special purpose is constitutionally justifiable; what is the principle on which a Cabinet may allow of open questions;—these and the like are the kind of inquiries raised and solved by writers whom, as being occupied with the conventional understandings of the constitution, we may term conventionalists. These inquiries are, many of them, great and weighty; but they are not inquiries which

will ever be debated in the law courts. If the Premier should advise the creation of five hundred Peers, the Chancery Division would not, we may be sure, grant an injunction to restrain their creation. If he should on a vote of censure decline to resign office, the King's Bench Division would certainly not issue a *quo warranto* calling upon him to show cause why he continues to be Prime Minister. As a lawyer, I find these matters too high for me. Their practical solution must be left to the profound wisdom of Members of Parliament; their speculative solution belongs to the province of political theorists.

One suggestion a mere legist may be allowed to make, namely, that the authors who insist upon and explain the conventional character of the understandings which make up a great part of the constitution, leave unexplained the one matter which needs explanation. They give no satisfactory answer to the inquiry how it happens that the understandings of politics are sometimes at least obeyed as rigorously as the commands of law.<sup>1</sup> To refer to public opinion and to considerations of expediency is to offer but a very inadequate solution of a really curious problem. Public opinion approves and public expediency requires the observance of contracts, yet contracts are not always observed, and would (presumably) be broken more often than they are did not the law punish their breach, or compel their performance. Meanwhile it is certain that understandings are not laws, and that no system of conventionalism will explain the whole nature of constitutional law, if indeed "constitutional law" be in strictness law at all.

And conventional view does not explain how conventions enforced.

<sup>1</sup> See further on this point, Part iii, ch. xv, *post*.

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Is constitutional law really "law" at all?

For at this point a doubt occurs to one's mind which must more than once have haunted students of the constitution. Is it possible that so-called "constitutional law" is in reality a cross between history and custom which does not properly deserve the name of law at all, and certainly does not belong to the province of a professor called upon to learn or to teach nothing but the true indubitable law of England? Can it be that a dark saying of de Tocqueville's, "the English constitution has no real existence" (*elle n'existe point*<sup>1</sup>), contains the truth of the whole matter? In this case lawyers would gladly surrender a domain to which they can establish no valid title. The one half of it should, as belonging to history, go over to our historical professors. The other half should, as belonging to conventions which illustrate the growth of law, be transferred either to my friend the Corpus Professor of Jurisprudence, because it is his vocation to deal with the oddities or the outlying portions of legal science, or to my friend the Chichele Professor of International Law, because he being a teacher of law which is not law, and being accustomed to expound those rules of public ethics which are miscalled international law, will find himself at home in expounding political ethics which, on the hypothesis under consideration, are miscalled constitutional law.

Before, however, admitting the truth of the supposition that "constitutional law" is in no sense law at all, it will be well to examine a little further into the precise meaning which we attach to the term con-

<sup>1</sup> de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. i (*Démocratie en Amérique*), pp. 166, 167.



stitutional law, and then consider how far it is a fit subject for legal exposition.

Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.<sup>1</sup> Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of the legislature and its mode of election. These rules also deal with Ministers, with their responsibility, with their spheres of action, define the territory over which the sovereignty of the state extends and settle who are to be deemed subjects or citizens. Observe the use of the word "rules," not "laws." This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

It consists of two different kinds of rules.

The one set of rules are in the strictest sense "laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the

(i.) Rules which are true laws — law of the constitution.

<sup>1</sup> Cf. Holland, *Jurisprudence* (10th ed., 1906), pp. 138, 139, and 359-363. "By the constitution of a country is meant so much of its law as relates to the designation and form of the legislature; the rights and functions of the several parts of the legislative body; the construction, office, and jurisdiction of courts of justice. The constitution is one principal division, section, or title of the code of public laws, distinguished from the rest only by the superior importance of the subject of which it treats."—Paley, *Moral Philosophy* (1785). Book vi, ch. vii.

mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction be called collectively "the law of the constitution."

(ii) Rules which are not laws—conventions of the constitution.

The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution," or constitutional morality.

To put the same thing in a somewhat different shape, "constitutional law," as the expression is used in England, both by the public and by authoritative writers, consists of two elements. The one element, here called the "law of the constitution," is a body of undoubted law; the other element, here called the "conventions of the constitution," consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers, and of other persons under the constitution, are not in strictness laws at all. The contrast between the law of the constitution and the conventions of the constitution may be most easily seen from examples.<sup>1</sup>

Examples of rules belonging to law of constitution.

To the law of the constitution belong the following rules:—

"The King can do no wrong." This maxim, as now interpreted by the courts, means, in the first place, that by no proceeding known to the law can

<sup>1</sup> See, however, Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 100-102, and Intro. pp. xcv *et seq.*, *ante*.

the King be made personally responsible for any act done by him; if (to give an absurd example) the King were himself to shoot the Premier through the head, no court in England could take cognisance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law; this principle in both its applications is (be it noted) a law and a law of the constitution, but it is not a written law. "There is no power in the Crown to dispense with the obligation to obey a law;" this negation or abolition of the dispensing power now depends upon the Bill of Rights; it is a law of the constitution and a written law. "Some person is legally responsible for every act done by the Crown." This responsibility of Ministers appears in foreign countries as a formal part of the constitution; in England it results from the combined action of several legal principles, namely, first, the maxim that the King can do no wrong; secondly, the refusal of the courts to recognise any act as done by the Crown, which is not done in a particular form, a form in general involving the affixing of a particular seal by a Minister, or the counter-signature or something equivalent to the counter-signature of a Minister; thirdly, the principle that the Minister who affixes a particular seal, or countersigns his signature, is responsible for the act which he, so to speak, endorses;<sup>1</sup> this again is part of the constitution and a law, but it is not a written law. So again the right to personal liberty, the right of public meeting, and many other rights, are part of the law

<sup>1</sup> Cf. Hearn, *Government of England* (2nd ed., 1887), ch. iv.

of the constitution, though most of these rights are consequences of the more general law or principle that no man can be punished except for direct breaches of law (*i.e.* crimes) proved in the way provided by law (*i.e.* before the courts of the realm).<sup>1</sup>

To the conventions of the constitution belong the following maxims : <sup>2</sup>—

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tution.

“The King must assent to, or (as it is inaccurately expressed) cannot ‘veto’<sup>3</sup> any bill passed by the two Houses of Parliament ;”—“the House of Lords does not originate any money bill ;”—“when the House of Lords acts as a Court of Appeal, no peer who is not a law lord takes part in the decisions of the House ;”—“Ministers resign office when they have ceased to command the confidence of the House of Commons ;”—“a bill must be read a certain number of times before passing through the House of Commons.” These maxims are distinguished from each other by many differences ;<sup>4</sup> under a new or written constitu-

<sup>1</sup> With one exception these examples are taken from the common law. Statutes as a source of constitutional law are generally disregarded throughout the text, especially in the chapters on the rule of law.—ED.

<sup>2</sup> See Jennings, *Cabinet Government* (1936), ch. i.

<sup>3</sup> As to the meaning of veto, see Hearn, *op. cit.*, pp. 51, 60, 61, 63, and Jennings, *op. cit.*, pp. 6, 296, 297.

<sup>4</sup> Some of these maxims are never violated, and are universally admitted to be inviolable. Others, on the other hand, have nothing but a slight amount of custom in their favour, and are of disputable validity. The main distinction between different classes of conventional rules may, it is conceived, be thus stated : Some of these rules could not be violated without bringing to a stop the course of orderly and pacific government ; others might be violated without any other consequence than that of exposing the Minister or other person by whom they were broken to blame or unpopularity.

In the opinion of the author this difference will at bottom be found to depend upon the degree of directness with which the violation of a given constitutional maxim brings the wrongdoer into conflict with the

tion some of them probably would and some of them would not take the form of actual laws. Under the English constitution they have one point in common: they are none of them "laws" in the true sense of that word, for if any or all of them were broken, no court would take notice of their violation.

It is to be regretted that these maxims must be called "conventional," for the word suggests a notion of insignificance or unreality.<sup>1</sup> This, however, is the last idea which any teacher would wish to convey to his hearers. Of constitutional conventions or practices some are as important as any laws, though some may be trivial, as may also be the case with a genuine law. My object, however, is to contrast, not shams with realities, but the legal element with the conventional element of so-called "constitutional law."

This distinction differs essentially, it should be

law of the land. Thus a Ministry under whose advice Parliament were not summoned to meet for more than a year would, owing to the lapse of the Army (Annual) Act, become through their agents engaged in a conflict with the Courts. The violation of a convention of the constitution would in this case lead to revolutionary or reactionary violence. The rule, on the other hand, that a Bill must be read a given number of times before it is passed is, though a well-established constitutional principle, a convention which might be disregarded without bringing the Government into conflict with the ordinary law. A Ministry who induced the House of Commons to pass an Act, *e.g.* suspending the Habeas Corpus Act, after one reading, or who induced the House to alter their rules as to the number of times a Bill should be read, would in no way be exposed to a contest with the ordinary tribunals. Ministers who, after Supplies were voted and the Army (Annual) Act passed, should prorogue the House and keep office for months after the Government had ceased to retain the confidence of the Commons, might or might not incur grave unpopularity, but would not necessarily commit a breach of law. See further Part iii, *post*, and cf. Intro. pp. cxxxvi *et seq.*, *ante*.

<sup>1</sup> Cf. Jennings, *The Law and the Constitution* (2nd ed., 1938), p. 80, for further criticism of the term.



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the same as  
difference  
between  
written  
and un-  
written  
law.

noted, from the distinction between "written law" (or statute law) and "unwritten law" (or common law). There are laws of the constitution, as, for example, the Bill of Rights, the Act of Settlement, the Habeas Corpus Acts, which are "written law," found in the statute-books—in other words, are statutory enactments. There are other most important laws of the constitution (several of which have already been mentioned) which are "unwritten" laws, that is, not statutory enactments. Some further of the laws of the constitution, such, for example, as the law regulating the descent of the Crown, which were at one time unwritten or common law, have now become written or statute law. The conventions of the constitution, on the other hand, cannot be recorded in the statute-book, though they may be formally reduced to writing. Thus the whole of our parliamentary procedure is nothing but a mass of conventional law; it is, however, recorded in written or printed rules. The distinction, in short, between written and unwritten law does not in any sense square with the distinction between the law of the constitution (constitutional law properly so called) and the conventions of the constitution. This latter is the distinction on which we should fix our whole attention, for it is of vital importance, and elucidates the whole subject of constitutional law. It is further a difference which may exist in countries which have a written or statutory constitution.<sup>1</sup> In the United States the legal

<sup>1</sup> The conventional element in the constitution of the United States is far larger than most Englishmen suppose. See Woodrow Wilson, *Congressional Government* (1925 ed.); Bryce, *American Commonwealth* (1910 ed.), vol. i, ch. xxxiv and xxxv; Horwill, *The Usages of the American Constitution* (1925). It may be asserted without much exag-

powers of the President, the Senate, the mode of electing the President, and the like, are, as far as the law is concerned, regulated wholly by the law of the constitution. But side by side with the law have grown up certain stringent conventional rules, which, though they would not be noticed by any court, have in practice nearly the force of law. No President has ever been re-elected more than once: the popular approval of this conventional limit (of which the constitution knows nothing) on a President's re-eligibility proved a fatal bar to General Grant's third candidature. Constitutional understandings have entirely changed the position of the Presidential electors. They were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President; the chief officer, in short, of the Republic was, according to the law, to be appointed under a system of double election. This intention has failed; the "electors" have become a mere means of voting for a particular candidate; they are no more than so many ballots cast for the Republican or for the Democratic nominee. The understanding that an elector is not really to elect, has now become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed

generation that the conventional element in the constitution of the United States is as large as in the English constitution. Under the American system, however, the line between "conventional rules" and "laws" is drawn with a precision hardly possible in England.

Under the constitution of the existing French Republic, constitutional conventions or understandings exert a considerable amount of influence. They considerably limit, for instance, the actual exercise of the large powers conferred by the letter of the constitution on the President. See Chardon, *L'Administration de la France—Les fonctionnaires* (1908), pp. 79-105.

by the most unscrupulous of politicians. Public difficulties, not to say dangers, might have been averted if, in the contest between Mr. Hayes and Mr. Tilden, a few Republican electors had felt themselves at liberty to vote for the Democratic candidate. Not a single man among them changed his side. The power of an elector to elect is as completely abolished by constitutional understandings in America as is the royal right of dissent from bills passed by both Houses by the same force in England. Under a written, therefore, as under an unwritten constitution, we find in full existence the distinction between the law and the conventions of the constitution.

Constitutional law as subject of legal study means solely law of constitution.

Upon this difference I have insisted at possibly needless length, because it lies at the very root of the matter under discussion. Once grasp the ambiguity latent in the expression "constitutional law," and everything connected with the subject falls so completely into its right place that a lawyer, called upon to teach or to study constitutional law as a branch of the law of England, can hardly fail to see clearly the character and scope of his subject.

With conventions or understandings he has no direct concern. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail to-day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are

possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced off against the dicta or practice of Beaconsfield and Gladstone. The subject, however, is not one of law but of politics, and need trouble no lawyer or the class of any professor of law. If he is concerned with it at all, he is so only in so far as he may be called upon to show what is the connection (if any there be) between the conventions of the constitution and the law of the constitution.<sup>1</sup>

This the true constitutional law is his only real concern. His proper function is to show what are the legal rules (*i.e.* rules recognised by the courts) which are to be found in the several parts of the constitution. Of such rules or laws he will easily discover more than enough. The rules determining the legal position of the Crown, the legal rights of the Crown's Ministers, the constitution of the House of Lords, the constitution of the House of Commons, the laws which govern the established Church, the laws which determine the position of the non-established Churches, the laws which regulate the army,—these and a hundred other laws form part of the law of the constitution, and are as truly part of the law of the land as the articles of the constitution of the United States form part of the law of the Union.<sup>2</sup>

<sup>1</sup> See Intro. pp. cxxxvi *et seq.*, *ante*, and cf. Jennings, *Cabinet Government* (1936), pp. 376-378.

<sup>2</sup> Cf. Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 68-70. The composition of the House of Lords is not determined by the courts. The argument excludes the Prime Minister and the Cabinet. Part iii, however, shows that the author intended to include those conventions which he regarded as dependent upon rules of law.—ED.

Law of  
constitu-  
tion can be  
expounded  
like any  
other  
branch of  
English  
law.

The duty, in short, of an English professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection. He ought to expound the unwritten or partly unwritten constitution of England, in the same manner in which Story and Kent have expounded the written law of the American constitution. The task has its special perplexities, but the difficulties which beset the topic are the same in kind, though not in degree, as those which are to be found in every branch of the law of England. You are called upon to deal partly with statute law, partly with judge-made law; you are forced to rely on Parliamentary enactments and also on judicial decisions, on authoritative dicta, and in many cases on mere inferences drawn from judicial doctrines; it is often difficult to discriminate between prevalent custom and acknowledged right. This is true of the endeavour to expound the law of the constitution; all this is true also in a measure of any attempt to explain our law of contract, our law of torts, or our law of real property.

Moreover, teachers of constitutional law enjoy at this moment one invaluable advantage. Their topic has, of recent years,<sup>1</sup> become of immediate interest and of pressing importance. These years have brought into the foreground new constitutional questions, and have afforded in many instances the answers thereto. The series of actions connected with the name of

<sup>1</sup> This treatise was originally published in 1885. Between that date and 1914 legal decisions and public discussion threw light upon several matters of constitutional law, such, for example, as the limits to the right of public meeting and the nature of martial law.



Mr. Bradlaugh<sup>1</sup> has done as much to clear away the obscurity which envelops many parts of our public law as was done in the eighteenth century by the series of actions connected with the name of John Wilkes. The law of maintenance has been rediscovered; the law of blasphemy has received new elucidation. Everybody now knows the character of a penal action. It is now possible to define with precision the relation between the House of Commons and the courts of the land; the legal character and solemnity of an oath has been made patent to all the world, or at any rate to all those persons who choose to read the *Law Reports*. Meanwhile circumstances with which Mr. Bradlaugh had no connection have forced upon public attention all the various problems connected with the right of public meeting. Is such a right known to the law? What are the limits within which it may be exercised? What is the true definition of an "unlawful assembly"? How far may citizens lawfully assembled assert their right of meeting by the use of force? What are the limits within which the English constitution recognises the right of self-defence? These are questions some of which have been raised and all of which may any day be raised before the courts. They are inquiries which touch the very root of our public law. To find the true reply to them is a matter of importance to every citizen. While these inquiries require an answer the study of the law of the constitution must remain a matter of pressing interest. The fact, however, that

<sup>1</sup> See for Bradlaugh's political career, *Dictionary of National Biography*, vol. xxii (Supplement), Reissue, 1908-9, p. 248.

the provisions of this law are often embodied in cases which have gained notoriety and excite keen feelings of political partisanship may foster a serious misconception. Unintelligent students may infer that the law of the constitution is to be gathered only from famous judgments which embalm the results of grand constitutional or political conflicts. This is not so. Scores of unnoticed cases, such as the *Parlement Belge*,<sup>1</sup> or *Thomas v. The Queen*,<sup>2</sup> touch upon or decide principles of constitutional law. Indeed every action against a constable or collector of revenue enforces the greatest of all such principles, namely, that obedience to administrative orders is no defence to an action or prosecution for acts done in excess of legal authority. The true law of the constitution is in short to be gathered from the sources whence we collect the law of England in respect to any other topic, and forms as interesting and as distinct, though not as well explored, a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out. Teachers and pupils alike therefore suffer from the inconvenience as they enjoy the interest of exploring a province of law which has not yet been entirely reduced to order.<sup>3</sup>

This inconvenience has one great compensation. We are compelled to search for the guidance of first

<sup>1</sup> (1879) 4 P.D. 129; on appeal (1880) 5 P.D. 197. Cf. *Walker v. Baird* [1892] A.C. 491, at p. 497; K. & L. 310.

<sup>2</sup> (1874) L.R. 10 Q.B. 31; K. & L. 231.

<sup>3</sup> Since these words were written in 1885, Sir William Anson's admirable *Law and Custom of the Constitution* has gone far to provide a complete scheme of English constitutional law. The latest editions of this work are: vol. i (5th ed., 1922), ed. Gwyer; vol. ii (4th ed., 1935), ed. Keith. It does not deal in detail with administrative powers.

principles, and as we look for a clue through the mazes of a perplexed topic, three such guiding principles gradually become apparent. They are, *first*, the legislative sovereignty of Parliament;<sup>1</sup> *secondly*, the universal rule or supremacy throughout the constitution of ordinary law;<sup>2</sup> and *thirdly* (though here we tread on more doubtful and speculative ground), the dependence in the last resort of the conventions upon the law of the constitution.<sup>3</sup> To examine, to elucidate, to test these three principles, forms, at any rate (whatever be the result of the investigation), a suitable introduction to the study of the law of the constitution.

<sup>1</sup> See Part i, *post*.

<sup>2</sup> See Part ii, *post*.

<sup>3</sup> See Part iii, *post*.

PART I

THE SOVEREIGNTY OF PARLIAMENT

## CHAPTER I

### THE NATURE OF PARLIAMENTARY SOVEREIGNTY<sup>1</sup>

THE sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions. Chapter  
I

My aim in this chapter is, in the first place, to explain the nature of Parliamentary sovereignty and to show that its existence is a legal fact, fully recognised by the law of England; in the next place, to prove that none of the alleged legal limitations on the sovereignty of Parliament have any existence; and, lastly, to state and meet certain speculative difficulties which hinder the ready admission of the doctrine that Parliament is, under the British constitution, an absolutely sovereign legislature. Aim of  
chapter.

)

A. *Nature of Parliamentary Sovereignty*.—Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the “King in Parliament,” and constitute Parliament.<sup>2</sup> Nature of  
Parlia-  
mentary  
Sove-  
reignty.

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitu-

<sup>1</sup> Cf. Intro. pp. xxxvi *et seq.*, *ante*.

<sup>2</sup> Cf. 1 Bl., *Comm.* p. 153.



## Part I.

tion, the right to make or unmake any law whatever ; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.<sup>1</sup>

A law may, for our present purpose, be defined as "any rule which will be enforced by the courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described : Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated : There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament. Some apparent exceptions to this rule no doubt suggest themselves. But these apparent exceptions, as where, for example, the Judges of the High Court of Justice make rules of court repealing Parliamentary enactments, are resolvable into cases in which Parliament either directly or indirectly sanctions subordinate legislation.<sup>2</sup> This is not the place for entering into any details as to the nature of judicial legislation ; the matter is mentioned here only in order to remove an obvious difficulty which might present itself to some students.

<sup>1</sup> This is not a distinctive characteristic. In France and Belgium the courts do not in practice question the validity of acts of the legislature, notwithstanding that in each case the powers of the legislature are limited by the constitution.—ED.

<sup>2</sup> Rules of court are made by a statutory committee of judges, barristers, and solicitors.—ED.

It will be necessary in the course of these lectures to say a good deal more about Parliamentary sovereignty, but for the present the above rough description of its nature may suffice. The important thing is to make clear that the doctrine of Parliamentary sovereignty is, both on its positive and on its negative side, fully recognised by the law of England.

Chapter  
I.

I. *Unlimited legislative authority of Parliament.* —The classical passage on this subject is the following extract from Blackstone's *Commentaries* :—

Unlimited  
legislative  
authority  
of Par-  
liament.

"The power and jurisdiction of Parliament, says Sir Edward Coke,<sup>1</sup> is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, '*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*' It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion

<sup>1</sup> *Fourth Institute*, p. 36.

## Part I

“ of the land ; as was done in a variety of instances,  
 “ in the reigns of king Henry VIII. and his three  
 “ children. It can change and create afresh even the  
 “ constitution of the kingdom and of parliaments them-  
 “ selves ; as was done by the act of union, and the  
 “ several statutes for triennial and septennial elections.  
 “ It can, in short, do everything that is not naturally  
 “ impossible ; and therefore some have not scrupled  
 “ to call its power, by a figure rather too bold, the  
 “ omnipotence of Parliament. True it is, that what the  
 “ Parliament doth, no authority upon earth can undo.  
 “ So that it is a matter most essential to the liberties of  
 “ this kingdom, that such members be delegated to this  
 “ important trust, as are most eminent for their probity,  
 “ their fortitude, and their knowledge ; for it was a  
 “ known apophthegm of the great lord treasurer Bur-  
 “ leigh, ‘ that England could never be ruined but by  
 “ a Parliament ’ : and, as Sir Matthew Hale observes,  
 “ this being the highest and greatest court over which  
 “ none other can have jurisdiction in the kingdom, if  
 “ by any means a misgovernment should any way fall  
 “ upon it, the subjects of this kingdom are left without  
 “ all manner of remedy. To the same purpose the  
 “ president Montesquieu, though I trust too hastily,  
 “ presages ; that as Rome, Sparta, and Carthage have  
 “ lost their liberty and perished, so the constitution of  
 “ England will in time lose its liberty, will perish :  
 “ it will perish whenever the legislative power shall  
 “ become more corrupt than the executive.”<sup>1</sup>

<sup>1</sup> 1 Bl., *Comm.* pp. 160, 161 ; cf. as to the sovereignty of Parliament, *De Republica Anglorum* ; *A Discourse on the Commonwealth of England*, by Sir Thomas Smith, edited by L. Alston (1906), Book ii, ch. i, p. 148. This book was originally published in 1583.

De Lolme has summed up the matter in a grotesque expression which has become almost proverbial. "It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman."

Chapter  
L.

This supreme legislative authority of Parliament is shown historically in a large number of instances.

Historical  
examples  
of Parlia-  
mentary  
sove-  
reignty.  
Act of  
Settle-  
ment.

The descent of the Crown was varied and finally fixed under the provisions of the Act of Settlement, whereby the King occupies the throne under a Parliamentary title; his claim to reign depends upon and is the result of a statute. This is a proposition which, at the present day, no one is inclined either to maintain or to dispute; but a glance at the statute-book shows that not much more than two hundred years ago Parliament had to insist strenuously upon the principle of its own lawful supremacy. The first section of 6 Anne, c. 7, enacts (*inter alia*), "That if any person or persons shall maliciously, advisedly, and directly by writing or printing maintain and affirm that our sovereign lady the Queen that now is, is not the lawful and rightful Queen of these realms, or that the pretended Prince of Wales, who now styles himself King of Great Britain, or King of England, by the name of James the Third, or King of Scotland, by the name of James the Eighth, hath any right or title to the Crown of these realms, or that any other person or persons hath or have any right or title to the same, otherwise than according to an Act of Parliament made in England in the first year of the reign of their late Majesties King William and Queen Mary, of ever blessed and glorious memory, intituled, An Act declaring the rights and liberties of the subject, and

## Part I.

“settling the succession of the Crown ; and one other  
 “Act made in England in the twelfth year of the reign  
 “of his said late Majesty King William the Third,  
 “intituled, An Act for the further limitation of the  
 “Crown, and better securing the rights and liberties of  
 “the subject ; and the Acts lately made in England  
 “and Scotland mutually for the union of the two  
 “kingdoms ; or that the Kings or Queens of this realm,  
 “with and by the authority of Parliament, are not able  
 “to make laws and statutes of sufficient force and  
 “validity to limit and bind the Crown, and the descent,  
 “limitation, inheritance, and government thereof ;  
 “every such person or persons shall be guilty of high  
 “treason, and being thereof lawfully convicted, shall  
 “be adjudged traitors, and shall suffer pains of death,  
 “and all losses and forfeitures as in cases of high  
 “treason.”<sup>1</sup>

Acts of  
 Union.

The Acts of Union (to one of which Blackstone calls attention) afford a remarkable example of the exertion of Parliamentary authority. But there is no single statute which is more significant either as to the theory or as to the practical working of the constitution than the Septennial Act. The circumstances of its enactment and the nature of the Act itself merit therefore special attention.

Septennial  
 Act.

In 1716 the duration of Parliament was under an Act of 1694 limited to three years, and a general election could not be deferred beyond 1717. The King and the Ministry were convinced (and with reason) that an appeal to the electors, many of whom were Jacobites, might be perilous not only to the Ministry but to the tranquillity of the state. The

<sup>1</sup> This enactment is still in force.



Parliament then sitting, therefore, was induced by the Ministry to pass the Septennial Act by which the legal duration of Parliament was extended from three to seven years, and the powers of the then existing House of Commons were in effect prolonged for four years beyond the time for which the House was elected.<sup>1</sup> This was a much stronger proceeding than passing say an Act which enabled future Parliaments to continue in existence without the necessity for a general election during seven instead of during three years. The statute was justified by considerations of statesmanship and expediency. This justification of the Septennial Act must seem to every sensible man so ample that it is with some surprise that one reads in writers so fair and judicious as Hallam or Lord Stanhope attempts to minimise the importance of this supreme display of legislative authority. "Nothing," writes Hallam, "can be more extravagant than what is sometimes confidently pretended by the ignorant, that the legislature exceeded its rights by this enactment; or, if that cannot legally be advanced, that it at least violated the trust of the people, and broke in upon the ancient constitution;" and this remark he bases on the ground that "the law for triennial Parliaments was of little more than 'twenty years' continuance. It was an experiment, which, as was argued, had proved unsuccessful; it was subject, like every other law, to be repealed entirely, or to be modified at discretion." <sup>2</sup>

<sup>1</sup> Similarly the Parliament elected in December, 1910, was extended by its own Acts until November, 1918; this Parliament by the Parliament Act, 1911, had reduced the legal duration to five years; see Intro. p. xliii, *ante*.—ED.

<sup>2</sup> Hallam, *Constitutional History of England* (1884 ed.), vol. iii, p. 236.

## Part I.

"We may," says Lord Stanhope, "... cast aside  
 "the foolish idea that the Parliament overstepped its  
 "legitimate authority in prolonging its existence; an  
 "idea which was indeed urged by party-spirit at the  
 "time, and which may still sometimes pass current in  
 "harangues to heated multitudes, but which has been  
 "treated with utter contempt by the best constitu-  
 "tional writers."<sup>1</sup>

Constitu-  
 tional im-  
 portance of  
 Septennial  
 Act.

These remarks miss the real point of the attack on the Septennial Act, and also conceal the constitutional importance of the statute. The thirty-one peers who protested against the Bill because (among other grounds) "it is agreed, that the House of Commons  
 "must be chosen by the people, and when so chosen,  
 "they are truly the representatives of the people,  
 "which they cannot be so properly said to be, when  
 "continued for a longer time than that for which they  
 "were chosen; for after that time they are chosen by  
 "the Parliament, and not the people, who are thereby  
 "deprived of the only remedy which they have against  
 "those, who either do not understand, or through  
 "corruption, do wilfully betray the trust reposed in  
 "them; which remedy is, to choose better men in their  
 "places,"<sup>2</sup> hit exactly the theoretical objection to it. The peculiarity of the Act was not that it changed the legal duration of Parliament or repealed the Triennial Act; the mere passing of a Septennial Act in 1716 was not and would never have been thought to be anything more startling or open to graver censure than the passing of a Triennial Act in 1694. What was startling was that an existing Parliament

<sup>1</sup> Lord Mahon, *History of England* (2nd ed., 1839), vol. i, p. 301.

<sup>2</sup> Thorold Rogers, *Protests of the Lords* (1875), vol. i, p. 218.

of its own authority prolonged its own legal existence. Nor can the argument used by Priestley,<sup>1</sup> and in effect by the protesting Peers, "that Septennial Parliaments "were at first a direct usurpation of the rights of the "people; for by the same authority that one Parlia- "ment prolonged their own power to seven years, they "might have continued it to twice seven, or like the "Parliament of 1641 have made it perpetual," be treated as a blunder grounded simply on the "ignorant assumption" that the Septennial Act prolonged the original duration of Parliament.<sup>2</sup> The contention of Priestley and others was in substance that members elected to serve for three years were constitutionally so far at least the delegates or agents of their constituents that they could not, without an inroad on the constitution, extend their own authority beyond the period for which it was conferred upon them by their principals, *i.e.* the electors. There are countries, and notably the United States, where an Act like the Septennial Act would be held legally invalid; no modern English Parliament would for the sake of keeping a government or party in office venture to pass say a Decennial Act and thus prolong its own duration; the contention therefore that Walpole and his followers in passing the Septennial Act violated the understandings of the constitution has on the face of it nothing absurd. Parliament made a legal though unprecedented use of its powers. To under- rate this exertion of authority is to deprive the Septennial Act of its true constitutional importance. That Act proves to demonstration that in a legal point

<sup>1</sup> See Priestley, *Essay on Government* (1771), p. 20.

<sup>2</sup> Hallam, *op. cit.*, vol. iii, p. 236 (note).

Part I. of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state, and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty.

Inter-  
ference of  
Parliament  
with  
private  
rights.

Hitherto we have looked at Parliament as legally omnipotent in regard to public rights. Let us now consider the position of Parliament in regard to those private rights which are in civilised states justly held specially secure or sacred. Coke (it should be noted) particularly chooses interference with private rights as specimens of Parliamentary authority.

"Yet some examples are desired. Daughters and "heirs apparent of a man or woman, may by Act of "Parliament inherit during the life of the ancestor.

"It may adjudge an infant, or minor, of full age.

"To attain a man of treason after his death.

"To naturalise a mere alien, and make him a "subject born. It may bastard a child that by law "is legitimate, viz. begotten by an adulterer, the "husband being within the four seas.

"To legitimate one that is illegitimate, and born "before marriage absolutely. And to legitimate "*secundum quid*, but not *simpliciter*." <sup>1</sup>

Coke is judicious in his choice of instances. Interference with public rights is at bottom a less striking exhibition of absolute power than is the interference with the far more important rights of individuals; a ruler who might think nothing of overthrowing the constitution of his country, would in all probability hesitate a long time before he touched the property or interfered with the contracts

<sup>1</sup> Coke, *Fourth Institute*, p. 36. See Intro. p. xxxvii, *ante*, for later examples in regard to public law.

of private persons. Parliament, however, habitually interferes, for the public advantage, with private rights. Indeed such interference has now (greatly to the benefit of the community) become so much a matter of course as hardly to excite remark, and few persons reflect what a sign this interference is of the supremacy of Parliament. The statute-book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons. This is of course the case with every railway Act, but no one will realise the full action, generally the very beneficial action of Parliamentary sovereignty, who does not look through a volume or two of what are called *Local and Private Acts*.<sup>1</sup> These Acts are just as much Acts of Parliament as any Statute of the Realm. They deal with every kind of topic, as with railways, harbours, docks, the settlement of private estates, and the like. To these you should add Acts such as those which declare valid marriages which, owing to some mistake of form or otherwise, have not been properly celebrated, and Acts, common enough at one time but now rarely passed, for the divorce of married persons.

One further class of statutes deserve in this connection more notice than they have received—these are Acts of Indemnity.

An Act of Indemnity is a statute, the object of which is to make legal transactions which when they took place were illegal, or to free individuals to whom the statute applies from liability for having broken the law; enactments of this kind were annually passed with almost unbroken regularity for more than

Acts of  
Indemnity.

<sup>1</sup> In 1936 160 Local and no Private Acts were enacted.—Ed.



**Part I.** a century (1727-1828) to free Dissenters from penalties, for having accepted municipal offices without duly qualifying themselves by taking the sacrament according to the rites of the Church of England. To the subject of Acts of Indemnity, however, we shall return in a later chapter.<sup>1</sup> The point to be now noted is that such enactments being as it were the legalisation of illegality are the highest exertion and crowning proof of sovereign power.

So far of the sovereignty of Parliament from its positive side: let us now look at the same doctrine from its negative aspect.

No other competing legislative authority.

II. *The absence of any competing legislative power.*—The King, each House of Parliament, the Constituencies, and the Law Courts, either have at one time claimed, or might appear to claim, independent legislative power. It will be found, however, on examination that the claim can in none of these cases be made good.

The King.

(i.) *The King.*—Legislative authority originally resided in the King in Council,<sup>2</sup> and even after the commencement of Parliamentary legislation there existed side by side with it a system of royal legislation under the form of Ordinances,<sup>3</sup> and (at a later period) of Proclamations.

Statute of Proclamations.

These had much the force of law, and in the year 1539 the Act 31 Henry VIII., c. 8, formally empowered the Crown to legislate by means of proclamations.

<sup>1</sup> See ch. v, *post*.

<sup>2</sup> See Stubbs, *Constitutional History of England*, vol. i (1874), pp. 126-128, and vol. ii (1875), pp. 245-247.

<sup>3</sup> Stubbs, *op. cit.*, vol. ii, ch. xv.

This statute is so short and so noteworthy that it may well be quoted *in extenso*. "The King," it runs, "for the time being, with the advice of his Council, or the more part of them, may set forth proclamations under such penalties and pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament; but this shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels, or life; and whosoever shall willingly offend any article contained in the said proclamations, shall pay such forfeitures, or be so long imprisoned, as shall be expressed in the said proclamations; and if any offending will depart the realm, to the intent he will not answer his said offence, he shall be adjudged a traitor."

This enactment marks the highest point of legal authority ever reached by the Crown, and, probably because of its inconsistency with the whole tenor of English law, was repealed in the reign of Edward the Sixth.<sup>1</sup> It is curious to notice how revolutionary would have been the results of the statute had it remained in force. It must have been followed by two consequences. An English king would have become nearly as despotic as a French monarch. The statute would further have established a distinction between "laws" properly so called as being made by the legislature and "ordinances" having the force of law, though not in strictness laws as being rather decrees of the executive power than Acts of the legislature. This distinction exists in one form or another in most continental states, and is not without great

<sup>1</sup> Cf. Holdsworth, *History of English Law*, vol. iv (1924), pp. 102, 103, and Intro. p. lxviii, *ante*. This view cannot now be accepted.—Ed.

**Part I.** practical utility. In foreign countries the legislature generally confines itself to laying down general principles of legislation, and leaves them with great advantage to the public to be supplemented by decrees or regulations which are the work of the executive. The cumbersomeness and prolixity of English statute law is due in no small measure to futile endeavours of Parliament to work out the details of large legislative changes. This evil has become so apparent that in modern times Acts of Parliament constantly contain provisions empowering the Privy Council, the judges, or some other body,<sup>1</sup> to make rules under the Act for the determination of details which cannot be settled by Parliament. But this is only an awkward mitigation<sup>2</sup> of an acknowledged evil, and the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law,

<sup>1</sup> Commonly Departmental Ministers.

<sup>2</sup> One of the author's critics objected to the words "awkward mitigation of an acknowledged evil" on the ground that they condemned in England a system which as it existed abroad was referred to as being not without great practical utility. The expression objected to was, however, justifiable, in the author's view. "Under the English system elaborate and detailed statutes are passed, and the power to make rules under the statute, e.g. by Order in Council or otherwise, is introduced only in cases where it is obvious that to embody the rules in the statute is either highly inexpedient or practically impossible. Under the foreign, and especially the French system, the form of laws, or in other words, of statutes, is permanently affected by the knowledge of legislators and draftsmen that any law will be supplemented by decrees. English statutes attempt, and with very little success, to provide for the detailed execution of the laws enacted therein. Foreign laws are, what every law ought to be, statements of general principles." For a review of the tendencies of legislation by regulation in the United Kingdom, see *Report of the Committee on Ministers' Powers* (Cmd. 4060, 1932), s. ii, and Willis, *The Parliamentary Powers of the English Government Departments* (1933).—ED.

work out the detailed application of the general principles embodied in the Acts of the legislature.<sup>1</sup> In this, as in some other instances, restrictions wisely placed by our forefathers on the growth of royal power, are at the present day the cause of unnecessary restraints on the action of the executive government. For the repeal of 31 Henry VIII, c. 8, rendered governmental legislation, with all its defects and merits, impossible, and left to proclamations only such weight as they might possess at common law. The exact extent of this authority was indeed for some time doubtful. In 1610, however, a solemn opinion or protest of the judges<sup>2</sup> established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament. In 1766 Lord Chatham attempted to prohibit by force of proclamation the exportation of wheat, and the Act of Indemnity, passed in consequence of this attempt, may be considered the final legislative disposal of any claim on the part of the Crown to make law by force of proclamation.

The main instances<sup>3</sup> where, in modern times, pro-

<sup>1</sup> See Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), paras. 140 and 141, pp. 1013-1038.

<sup>2</sup> See *Case of Proclamations* (1610) 12 Co. Rep. 74; K. & L. 63; and Gardiner, *History of England*, vol. ii (1883), pp. 104, 105.

<sup>3</sup> In rare instances, which are survivals from the time when the King of England was the true "sovereign" in the technical sense of that term, the Crown exercises legislative functions in virtue of the prerogative. Thus the Crown can legislate, by proclamations or Orders in Council, for a newly conquered country (*Campbell v. Hall* (1774) Loft. 655; J. & Y. 39), and has claimed the right, though the validity thereof is doubtful, to legislate for the Channel Islands by

Part I. — clamation or orders in council are of any effect are cases either where, at common law, a proclamation is the regular mode, not of legislation, but of announcing the executive will of the King, as when Parliament is summoned by proclamation, or else where orders in council have authority given to them by Act of Parliament.

Houses of  
Parlia-  
ment.

(ii.) *Resolutions of either House of Parliament.*— The House of Commons, at any rate, has from time to time appeared to claim for resolutions of the House, something like legal authority. That this pretension cannot be supported is certain, but there exists some difficulty in defining with precision the exact effect which the courts concede to a resolution of either House.

Two points are, however, well established.

Orders in Council. *In the Matter of the States of Jersey* (1853) 9 Moo. P.C.C. 185, 262. "The Channel Islands indeed claim to have conquered England, and are the sole fragments of the dukedom of Normandy which still continue attached to the British Crown. For this reason, in these islands alone of all British possessions does any doubt arise as to whether an Act of the Imperial Parliament is of its own force binding law. In practice, when an Act is intended to apply to them, a section is inserted authorising the King in Council to issue an Order for the application of the Act to these islands, and requiring the registration of that Order in the islands, and the Order in Council is made by the King and registered by the States accordingly." Sir H. Jenkyns, *British Rule and Jurisdiction beyond the Seas* (1902), p. 37. But whatever doubt may arise in the Channel Islands, every English lawyer knows that any English court will hold that an Act of Parliament clearly intended to apply to the Channel Islands is in force there *proprio vigore*, whether registered by the States or not. See also *Renouf v. Attorney-General for Jersey* [1936] A.C. 445 for an interesting account of legislation in the Channel Islands.

As to the legislative power of the Crown in Colonies which are not self-governing, see further Jenkyns, *op. cit.*, p. 95, and Jennings and Young, *The Constitutional Laws of the British Empire* (1937), ch. ii.



*First*, The resolution of neither House is a law.

Chapter  
I.

This is the substantial result of the case of *Stockdale v. Hansard*.<sup>1</sup> The gist of the decision in that case is that a libellous document did not cease to be a libel because it was published by the order of the House of Commons, or because the House subsequently resolved that the power of publishing the report which contained it, was an essential incident to the constitutional functions of Parliament.

Resolutions of  
either  
House.

*Secondly*, Each House of Parliament has complete control over its own proceedings, and also has the right to protect itself by committing for contempt any person who commits any injury against, or offers any affront to the House, and no court of law will inquire into the mode in which either House exercises the powers which it by law possesses.

The practical difficulty lies in the reconciliation of the first with the second of these propositions, and is best met by following out the analogy suggested by Mr. Justice Stephen, between a resolution of the House of Commons, and the decision of a court from which there is no appeal.

"I do not say," runs his judgment, "that the resolution of the House is the judgment of a court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a court of justice; but the effect of its privilege to regulate its own internal concerns, practically invests it with a judicial character when it has to apply to particular cases the provisions of

<sup>1</sup> See *Stockdale v. Hansard* (1839) 9 A. & E. 1; K. & L. 78; *Case of the Sheriff of Middlesex* (1840) 11 A. & E. 273; K. & L. 92; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; K. & L. 96; *Burdett v. Abbot* (1811) 14 East 1.

**Part I.** "Acts of Parliament. We must presume that it dis-  
 "charges this function properly, and with due regard  
 "to the laws, in the making of which it has so great  
 "a share. If its determination is not in accordance  
 "with law, this resembles the case of an error by a  
 "judge whose decision is not subject to appeal. There  
 "is nothing startling in the recognition of the fact  
 "that such an error is possible. If, for instance, a  
 "jury in a criminal case give a perverse verdict, the  
 "law has provided no remedy. The maxim that there  
 "is no wrong without a remedy, does not mean, as it  
 "is sometimes supposed, that there is a legal remedy  
 "for every moral or political wrong. If this were its  
 "meaning, it would be manifestly untrue. There is  
 "no legal remedy for the breach of a solemn promise  
 "not under seal, and made without consideration;  
 "nor for many kinds of verbal slander, though each  
 "may involve utter ruin; nor for oppressive legisla-  
 "tion, though it may reduce men practically to  
 "slavery; nor for the worst damage to person and  
 "property inflicted by the most unjust and cruel war.  
 "The maxim means only that legal wrong and legal  
 "remedy are correlative terms; and it would be more  
 "intelligibly and correctly stated, if it were reversed,  
 "so as to stand, 'Where there is no legal remedy,  
 "there is no legal wrong.'"<sup>1</sup>

Law as to  
 effect of  
 resolutions  
 of either  
 House.

The law therefore stands thus. Either House of  
 Parliament has the fullest power over its own pro-  
 ceedings, and can, like a court, commit for contempt  
 any person who, in the judgment of the House, is  
 guilty of insult or affront to the House. The *Case of*  
*the Sheriff of Middlesex*<sup>2</sup> carries this right to the very

<sup>1</sup> *Bradlaugh v. Gossett*, ante, at p. 285.

<sup>2</sup> (1840) 11 A. & E. 273; K. & L. 92.

farthest point. The Sheriff was imprisoned for contempt under a warrant issued by the Speaker. Every one knew that the alleged contempt was nothing else than obedience by the Sheriff to the judgment of the Court of Queen's Bench in the case of *Stockdale v. Hansard*, and that the Sheriff was imprisoned by the House because under such judgment he took the goods of the defendant Hansard in execution. Yet when the Sheriff was brought by habeas corpus before the Queen's Bench the Judges held that they could not inquire what were the contempts for which the Sheriff was committed by the House. The courts, in other words, do not claim any right to protect their own officials from being imprisoned by the House of Commons for alleged contempt of the House, even though the so-called contempt is nothing else than an act of obedience to the courts. A declaration or resolution of either House, on the other hand, is not in any sense a law. Suppose that *X* were by order of the House of Commons to assault *A* out of the House, irrespective of any act done in the House, and not under a warrant committing *A* for contempt; or suppose that *X* were to commit some offence by which he incurred a fine under some Act of Parliament, and that such fine were recoverable by *A* as a common informer. No resolution of the House of Commons ordering or approving of *X*'s act could be pleaded by *X* as a legal defence to proceedings, either civil or criminal, against him.<sup>1</sup> If proof of this were wanted it would be afforded by the Parliamentary Papers Act, 1840. The object of this Act, passed in consequence of the controversy connected with the

<sup>1</sup> Cf. *Attorney-General v. Bradlaugh* (1885) 14 Q.B.D. 667.

## Part I.

case of *Stockdale v. Hansard*, is to give summary protection to persons employed in the publication of Parliamentary papers, which are, it should be noted, papers published by the order of one or other of the Houses of Parliament. The necessity for such an Act is the clearest proof that an order of the House is not of itself a legal defence for the publication of matters which would otherwise be libellous. The House of Commons, "by invoking the authority of the whole "Legislature to give validity to the plea they had "vainly set up in the action [of *Stockdale v. Hansard*], "and by not appealing against the judgment of the "Court of Queen's Bench, had, in effect, admitted the "correctness of that judgment and affirmed the great "principle on which it was founded, viz. that no single "branch of the Legislature can, by any assertion of its "alleged privileges, alter, suspend, or supersede any "known law of the land, or bar the resort of any "Englishman to any remedy, or his exercise and "enjoyment of any right, by that law established."<sup>1</sup>

<sup>1</sup> Arnould, *Memoir of Thomas, first Lord Denman* (1873), vol. ii, p. 70. Nothing is harder to define than the extent of the indefinite powers or rights possessed by either House of Parliament under the head of privilege or law and custom of Parliament. The powers exercised by the Houses, and especially in practice by the House of Commons, make a near approach to an authority above that of the ordinary law of the land. Parliamentary privilege has from the nature of things never been the subject of precise legal definition. One or two points are worth notice as being clearly established.

1. Either House of Parliament may commit for contempt, and the courts will not go behind the committal and inquire into the facts constituting the alleged contempt provided that the cause of the contempt is not stated; May, *Parliamentary Practice* (13th ed., 1924), pp. 74, 78. Hence either House may commit to prison for contempt any person whom the House think guilty of contempt; *Burdett v. Abbot* (1811) 14 East 1; *Case of the Sheriff of Middlesex* (1840) 11 A. & E. 809; K. & L. 92. If the cause of committal stated in the writ is insufficient in law, a writ of habeas corpus will "lie" to secure the release of the person committed; *Paty's Case* (1704) 2 Ld. Raym. 1105, per Holt, C.J.

(iii.) *The Vote of the Parliamentary Electors.*<sup>1</sup>— Chapter I.

Expressions are constantly used in the course of political discussions which imply that the body of persons entitled to choose members of Parliament possess under the English constitution some kind of legislative authority. Such language is, as we shall see, not without a real meaning;<sup>2</sup> it points to the important consideration that the wishes of the constituencies influence the action of Parliament. But any expressions which attribute to Parliamentary electors a legal part in the process of law-making are quite inconsistent with the view taken by the law of the position of an elector. The sole legal right of electors under the English constitution is to elect members of Parliament. Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament. No court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament, and through Parliament alone. This is not a necessary incident of representative government. In Switzer-

2. The House of Lords have power to commit an offender to prison for a specified term, even beyond the duration of the session (May, *Parliamentary Practice* (13th ed., 1924), pp. 100, 101). But the House of Commons do not commit for a definite period, and prisoners committed by the House are, if not sooner discharged, released from their confinement on a prorogation.

3. A libel upon either House of Parliament or upon a member thereof, in his character of a member, has been often treated as a contempt. (*Ibid.*)

4. The Houses and all the members thereof have all the privileges necessary for the performance of their duties. (See generally May, *op. cit.*, ch. iii.)

<sup>1</sup> For an account of the development of the people's part in English government, see Emden, *The People and the Constitution* (1933).—Ed.

<sup>2</sup> See pp. 72-76, *post*.



**Part I.** land no change can be introduced in the constitution<sup>1</sup> which has not been submitted for approval or disapproval to all male citizens who have attained their majority; and even an ordinary law which does not involve a change in the constitution may, after it has been passed by the Federal Assembly, be submitted on the demand of a certain number of citizens to a popular vote, and is annulled if a vote is not obtained in its favour.<sup>2</sup>

**The Courts.** (iv.) *The Law Courts.*—A large proportion of English law is in reality made by the judges, and whoever wishes to understand the nature and the extent of judicial legislation in England, should read Pollock's admirable essay on the *Science of Case Law*.<sup>3</sup> The topic is too wide a one to be considered at any length in these lectures. All that we need note is that the adhesion by our judges to precedent, that is, their habit of deciding one case in accordance with the principle, or supposed principle, which governed a former case, leads inevitably to the gradual formation by the courts of fixed rules for decision, which are in effect laws. This judicial legislation might appear, at first sight, inconsistent with the supremacy of Parliament. But this is not so. English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation,

<sup>1</sup> *Constitution Fédérale de la Confédération Suisse*, Arts. 118-121; see Adams and Cunningham, *The Swiss Confederation* (1889), ch. vi.

<sup>2</sup> *Constitution Fédérale de la Confédération Suisse*, Art. 89.

<sup>3</sup> Pollock, *Essays in Jurisprudence and Ethics* (1882), p. 237 (*The Science of Case Law*), and see Dicey, *Law and Opinion in England* (2nd ed., 1914), Lecture xi (p. 361), and Note iv (p. 483).

carried on with the assent and subject to the supervision of Parliament.

Chapter  
I.

B. *Alleged legal limitations on the legislative sovereignty of Parliament.*—All that can be urged as to the speculative difficulties of placing any limits whatever on sovereignty has been admirably stated by Austin and by Professor Holland.<sup>1</sup> With these difficulties we have, at this moment, no concern. Nor is it necessary to examine whether it be or be not true, that there must necessarily be found in every state some person, or combination of persons, which, according to the constitution, whatever be its form, can legally change every law, and therefore constitutes the legally supreme power in the state. Our whole business is now to carry a step further the proof that, under the English constitution, Parliament does constitute such a supreme legislative authority or sovereign power as, according to Austin and other jurists, must exist in every civilised state, and for that purpose to examine into the validity of the various suggestions, which have from time to time been made, as to the possible limitations on Parliamentary authority, and to show that none of them are countenanced by English law.

Alleged  
limitations.

The suggested limitations are three in number.<sup>2</sup>

<sup>1</sup> See Austin, *Jurisprudence* (4th ed., 1879), pp. 270-274, and Holland, *Jurisprudence* (10th ed., 1906), pp. 47-52 and 359-363. The nature of sovereignty is also stated with brevity and clearness in Lewis, *Remarks on the Use and Abuse of some Political Terms* (1832), pp. 37-53; cf. Bryce, *Studies in History and Jurisprudence* (1901), vol. ii, Essay ix, Obedience, and Essay x, The Nature of Sovereignty.

<sup>2</sup> Another limitation has been suggested more or less distinctly by judges such as Coke (*Bonham's Case* (1610) 8 Co. Rep. 118, and *Case of Proclamations* (1610) 12 Co. Rep. 74, at p. 76; and see Hearn, *Government of England* (2nd ed., 1887), pp. 48, 49); an Act of Parliament cannot (it has been intimated) overrule the principles of the common

## Part I.

## Moral law.

*First*, Acts of Parliament, it has been asserted, are invalid if they are opposed to the principles of morality or to the doctrines of international law. Parliament, it is in effect asserted, cannot make a law opposed to the dictates of private or public morality. Thus Blackstone lays down in so many words that the "law of nature being coeval with mankind, and "dictated by God himself, is of course superior in "obligation to any other. It is binding over all the "globe, in all countries, and at all times: no human "laws are of any validity if contrary to this; and such "of them as are valid derive all their force and all "their authority, mediately or immediately, from this "original;"<sup>1</sup> and expressions are sometimes used by modern judges which imply that the courts might refuse to enforce statutes going beyond the proper limits (internationally speaking) of Parliamentary authority.<sup>2</sup> But to words such as those of Blackstone, and to the *obiter dicta* of the Bench, we must give a very qualified interpretation. There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate<sup>3</sup>

law. This doctrine once had a real meaning (see Maine, *Early History of Institutions* (7th ed., 1905), pp. 381, 382), but it has never received systematic judicial sanction and is now obsolete.

<sup>1</sup> 1 Bl., *Comm.* 41, and see Hearn, *Government of England* (2nd ed., 1887), pp. 48, 49. <sup>2</sup> See *Ex parte Blain* (1879) 12 Ch. D. 522, at p. 531.

<sup>3</sup> See *Colquhoun v. Brooks* (1888) 21 Q.B.D. 52; and compare Lord Esher, at pp. 57, 58, with Fry, L.J., at pp. 61, 62. See Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933), pp. 2-6, for an account of the presumptions which regulate in some measure the applications of statutes.

the ordinary rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality. A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority. The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesi* a law, and therefore entitled to obedience by the courts.

*Secondly*, Doctrines have at times been maintained which went very near to denying the right of Parliament to touch the Prerogative.<sup>1</sup> Pre-rogative.

In the time of the Stuarts<sup>2</sup> the doctrine was maintained, not only by the King, but by lawyers and statesmen who, like Bacon, favoured the increase of royal authority, that the Crown possessed under the name of the "prerogative" a reserve, so to speak, of wide and indefinite rights and powers, and that this prerogative or residue of sovereign power was superior to the ordinary law of the land. This doctrine combined with the deduction from it that the Crown could suspend the operation of statutes, or at any rate grant dispensation from obedience to them, certainly suggested the notion that the high powers of the prerogative were to a certain extent beyond the reach of Parliamentary enactment. We need not, however,

<sup>1</sup> See Stubbs, *Constitutional History of England*, vol. ii (1875), pp. 239, 486, 513-515.

<sup>2</sup> Gardiner, *History of England*, vol. iii (1883), pp. 1-5; cf. as to Bacon's view of the prerogative, Abbott, *Francis Bacon* (1885), pp. 140, 260, 279.

**Part I.** now enter into the political controversies of another age. All that need be noticed is that though certain powers—as, for example, the right of making treaties—are now left by law in the hands of the Crown, and are exercised in fact by the executive government, no modern lawyer would maintain that these powers or any other branch of royal authority could not be regulated or abolished by Act of Parliament, or, what is the same thing, that the judges might legally treat as invalid a statute, say, regulating the mode in which treaties are to be made, or making the assent of the Houses of Parliament necessary to the validity of a treaty.<sup>1</sup>

Preceding  
Acts of  
Parlia-  
ment.

*Thirdly*, Language has occasionally been used in Acts of Parliament which implies that one Parliament can make laws which cannot be touched by any subsequent Parliament, and that therefore the legislative authority of an existing Parliament may be limited by the enactments of its predecessors.<sup>2</sup>

<sup>1</sup> Compare the parliamentary practice in accordance with which the consent or recommendation of the Crown is required to the consideration of Bills touching the prerogative or the interests of the Crown.

<sup>2</sup> This doctrine was known to be erroneous by Bacon. "The principal law that was made this Parliament was a law of a strange nature, rather just than legal, and more magnanimous than provident. This law did ordain, That no person that did assist in arms or otherwise the King for the time being, should after be impeached therefor, or attainted either by the course of law or by Act of Parliament; for if any such act of attainder did hap to be made, it should be void and of none effect. . . . But the force and obligation of this law was in itself illusory, as to the latter part of it; (by a precedent Act of Parliament to bind or frustrate a future). For a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed; no more than if a man should appoint or declare by his will that if he made any later will it should be void. And for the case of the Act of Parliament, there is a notable precedent of it in King Henry the Eighth's time, who doubting he might die in the minority of his son, provided an Act to



That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure. Of statutes intended to arrest the possible course of future legislation, the most noteworthy are the Acts which embody the treaties of Union with Scotland<sup>1</sup> and Ireland.<sup>2</sup> The legislators who passed these Acts assuredly intended to give to certain portions of them more than the ordinary effect of statutes. Yet the history of legislation in respect of these very Acts affords the strongest proof of the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body. Thus the Act of Union with Scotland enacts in effect that every professor of a Scotch University shall acknowledge and profess and subscribe the Confession of Faith as his profession of faith, and in substance enacts that this provision shall be a fundamental and essential condition of the treaty of union in all time coming.<sup>3</sup> But this very provision has been in its main part repealed by the Universities (Scotland) Act, 1853, which relieves most professors in the Scotch universities from the necessity of subscribing the Confession of Faith. Nor is this by any means the only inroad made upon the terms of the

Chapter  
I.

The Acts  
of Union.

“pass, That no statute made during the minority of a King should bind him or his successors, except it were confirmed by the King under his great seal at his full age. But the first Act that passed in King Edward the Sixth’s time was an Act of repeal of that former Act; at which time nevertheless the King was minor. But things that do not bind may satisfy for the time.”—*The Works of Francis Bacon*, ed. by Spedding, Ellis and Heath, vol. vi (1858 ed.), pp. 159, 160.

<sup>1</sup> Act of Union with Scotland, 1706.

<sup>2</sup> Act of Union with Ireland, 1800.

<sup>3</sup> See Act of Union with Scotland, 1706, art. 25.

Part I. Act of Union ; from one point of view at any rate the Act 10 Anne, c. 21,<sup>1</sup> restoring the exercise of lay patronage, was a direct infringement upon the Treaty of Union. The intended unchangeableness, and the real liability of these Acts or treaties to be changed by Parliament, comes out even more strikingly in the history of the Act of Union with Ireland. The fifth Article of that Act runs as follows :—"That it be the "fifth article of Union, that the Churches of England "and Ireland as now by law established, be united into "one Protestant Episcopal Church, to be called the "United Church of England and Ireland ; and that "the doctrine, worship, discipline, and government of "the said United Church shall be and shall remain "in full force for ever, as the same are now by law "established for the Church of England ; and that "the continuance and preservation of the said United "Church, as the established Church of England and "Ireland, shall be deemed and be taken to be an "essential and fundamental part of the Union."

That the statesmen who drew and passed this Article meant to bind the action of future Parliaments is apparent from its language. That the attempt has failed of success is apparent to every one who knows the contents of the Irish Church Act, 1869.

Act limit-  
ing right of  
Parliament  
to tax  
colonies.

One Act, indeed, of the British Parliament might, looked at in the light of history, claim a peculiar sanctity. It is certainly an enactment of which the terms, we may safely predict, will never be repealed and the spirit will never be violated. This Act is the Taxation of Colonies Act, 1778. Section one provides that Parliament "will not impose any duty, tax, or "assessment whatever, payable in any of his Majesty's

<sup>1</sup> Cf. Innes, *Law of Creeds in Scotland* (1867), pp. 118-121.

“ colonies, provinces, and plantations in North America  
 “ or the West Indies ; except only such duties as it  
 “ may be expedient to impose for the regulation of  
 “ commerce ; the net produce of such duties to be  
 “ always paid and applied to and for the use of the  
 “ colony, province, or plantation, in which the same  
 “ shall be respectively levied, in such manner as other  
 “ duties collected by the authority of the respective  
 “ general courts, or general assemblies, of such  
 “ colonies, provinces, or plantations, are ordinarily  
 “ paid and applied.”

This language becomes the more impressive when contrasted with the American Colonies Act, 1776, which, being passed in that year to repeal the Acts imposing the Stamp Duties, carefully avoids any surrender of Parliament's right to tax the colonies. There is no need to dwell on the course of events of which these two Acts are a statutory record. The point calling for attention is that though policy and prudence condemn the repeal of the Taxation of Colonies Act, 1778, or the enactment of any law inconsistent with its spirit, there is under our constitution no legal difficulty in the way of repealing or overriding this Act. If Parliament were tomorrow to impose a tax, say on New Zealand or on the Canadian Dominion, the statute imposing it would be a legally valid enactment.<sup>1</sup> As stated in short by a very judicious writer—“ It equally is certain that a  
 “ Parliament cannot so bind its successors by the  
 “ terms of any statute, as to limit the discretion of a  
 “ future Parliament, and thereby disable the Legis-  
 “ lature from entire freedom of action at any future

<sup>1</sup> Cf. Statute of Westminster, 1931, s. 4, and Intro. pp. xlv *et seq.*, *ante*.

Part I. "time when it might be needful to invoke the  
 "interposition of Parliament to legislate for the  
 "public welfare."<sup>1</sup>

• Parliamentary sovereignty is therefore an undoubted legal fact.

It is complete both on its positive and on its

<sup>1</sup> Todd, *Parliamentary Government in the British Colonies* (1st ed., 1880), p. 192; cf. Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 142 *et seq.* It is a matter of curious, though not uninteresting, speculation to consider why it is that Parliament, though on several occasions passing Acts which were intended to be immutable, has never in reality succeeded in restricting its own legislative authority.

This question may be considered either logically or historically.

The logical reason why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment. An Act, whatever its terms, passed by Parliament might be repealed in a subsequent, or indeed in the same, session, and there would be nothing to make the authority of the repealing Parliament less than the authority of the Parliament by which the statute, intended to be immutable, was enacted. "Limited Sovereignty," in short, is in the case of a Parliamentary as of every other sovereign, a contradiction in terms. Its frequent and convenient use arises from its in reality signifying, and being by any one who uses words with any accuracy understood to signify, that some person, *e.g.* a king, who was at one time a real sovereign or despot, and who is in name treated as an actual sovereign, has become only a part of the power which is legally supreme or sovereign in a particular state. This, it may be added, is the true position of the king in most constitutional monarchies.

Let the reader, however, note that the impossibility of placing a limit on the exercise of sovereignty does not in any way prohibit either logically, or in matter of fact, the abdication of sovereignty. This is worth observation, because a strange dogma is sometimes put forward that a sovereign power, such as the Parliament of the United Kingdom, can never by its own act divest itself of sovereignty. This position is, however, clearly untenable. An autocrat, such as the Russian Czar, can undoubtedly abdicate; but sovereignty or the possession of supreme power in a state, whether it be in the hands of a Czar or of a Parliament, is always one and the same quality. If the Czar can abdicate, so can a Parliament. To argue or imply that because sovereignty is not limitable (which is true) it cannot be surrendered (which is palpably untrue) involves the confusion of two distinct ideas. It is like arguing that because no man can, while he lives, give up, do what he will, his freedom of volition, so no man

negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parlia- Chapter  
I.

can commit suicide. A sovereign power can divest itself of authority<sup>o</sup> in two ways, and (it is submitted) in two ways only. It may simply put an end to its own existence. Parliament could extinguish itself by legally dissolving itself and leaving no means whereby a subsequent Parliament could be legally summoned. (See Bryce, *American Commonwealth* (1910 ed.), p. 243, note 1). A step nearly approaching to this was taken by the Barebones Parliament when, in 1653, it resigned its power into the hands of Cromwell. A sovereign again may transfer sovereign authority to another person or body of persons. The Parliament of England went very near doing this when, in 1539, the Crown was empowered to legislate by proclamation; and though the fact is often overlooked, the Parliaments both of England and of Scotland did, at the time of the Union, each transfer sovereign power to a new sovereign body, namely, the Parliament of Great Britain. This Parliament, however, just because it acquired the full authority of the two legislatures by which it was constituted, became in its turn a legally supreme or sovereign legislature, authorised therefore, though contrary perhaps to the intention of its creators, to modify or abrogate the Act of Union by which it was constituted. If indeed the Act of Union had left alive the Parliaments of England and of Scotland, though for one purpose only, namely, to modify when necessary the Act of Union, and had conferred upon the Parliament of Great Britain authority to pass any law whatever which did not infringe upon or repeal the Act of Union, then the Act of Union would have been a fundamental law unchangeable legally by the British Parliament: but in this case the Parliament of Great Britain would have been, not a sovereign, but a subordinate, legislature, and the ultimate sovereign body, in the technical sense of that term, would have been the two Parliaments of England and of Scotland respectively. The statesmen of these two countries saw fit to constitute a new sovereign Parliament, and every attempt to tie the hands of such a body necessarily breaks down, on the logical and practical impossibility of combining absolute legislative authority with restrictions on that authority which, if valid, would make it cease to be absolute.

The historical reason why Parliament has never succeeded in passing immutable laws, or in other words, has always retained its character of a supreme legislature, lies deep in the history of the English people and in the peculiar development of the English constitution. England has, at any rate since the Norman Conquest, been always governed by an absolute legislator. This lawgiver was originally the Crown, and the peculiarity of the process by which the English constitution has been developed lies in the fact that the legislative authority of the Crown has never been curtailed, but has been transferred from



## Part I.

ment, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.

No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the courts.

This doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution. But it is, we must admit, a dogma which does not always find ready acceptance, and it is well worth while to note and examine the difficulties which impede the admission of its truth.

Difficulties  
as to Par-  
liamentary  
Sovereignty.

*C. Difficulties as to the doctrine of Parliamentary Sovereignty.*—The reasons why many persons find

the Crown acting alone (or rather in Council) to the Crown acting first together with, and then in subordination to, the Houses of Parliament. Hence Parliament, or in technical terms the King in Parliament, has become—it would perhaps be better to say has always remained—a supreme legislature. It is well worth notice that on the one occasion when English reformers broke from the regular course of English historical development, they framed a written constitution, anticipating in many respects the constitutionalism of the United States, and placed the constitution beyond the control of the ordinary legislature. It is quite clear that, under the Instrument of Government of 1653, Cromwell intended certain fundamentals to be beyond the reach of Parliament. It may be worth observing that the constitution of 1653 placed the Executive beyond the control of the legislature. The protector under it occupied a position which may well be compared either with that of the American President or of the German Emperor. See Harrison, *Oliver Cromwell* (1888), pp. 194-203. For a view of sovereignty which, though differing to a certain extent from the view put forward in this work, is full of interest and instruction, see Sidgwick, *Elements of Politics* (1897), ch. xxi (Sovereignty and Order).

it hard to accept the doctrine of Parliamentary sovereignty are twofold. Chapter  
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The dogma sounds like a mere application to the British constitution of Austin's theory of sovereignty, and yet intelligent students of Austin must have noticed that Austin's own conclusion as to the persons invested with sovereign power under the British constitution does not agree with the view put forward, on the authority of English lawyers, in these lectures. For while lawyers maintain that sovereignty resides in "Parliament," i.e. in the body constituted by the King, the House of Lords, and the House of Commons, Austin holds<sup>1</sup> that the sovereign power is vested in the King, the House of Lords, and the Commons or the electors. Difficulty  
from  
Austin's  
theory.

Every one, again, knows as a matter of common sense that, whatever lawyers may say, the sovereign power of Parliament is not unlimited, and that King, Lords, and Commons united do not possess anything like that "restricted omnipotence"—if the term may be excused—which is the utmost authority ascribable to any human institution. There are many enactments, and these laws not in themselves obviously unwise or tyrannical, which Parliament never would and (to speak plainly) never could pass. If the doctrine of Parliamentary sovereignty involves the attribution of unrestricted power to Parliament, the dogma is no better than a legal fiction, and certainly is not worth the stress here laid upon it.<sup>2</sup> Difficulty  
from actual  
limitation  
on power  
of Parlia-  
ment.

<sup>1</sup> See Austin, *Jurisprudence* (4th ed., 1879), vol. i, pp. 251-255. Compare Austin's language as to the sovereign body under the constitution of the United States (*ibid.*, p. 268).

<sup>2</sup> Cf. Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 139-144.

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Both these difficulties are real and reasonable difficulties. They are, it will be found, to a certain extent connected together, and well repay careful consideration.

Criticism  
on Austin's  
theory.

As to Austin's theory of sovereignty in relation to the British constitution.—Sovereignty, like many of Austin's conceptions, is a generalisation drawn in the main from English law, just as the ideas of the economists of Austin's generation are (to a great extent) generalisations suggested by the circumstances of English commerce. In England we are accustomed to the existence of a supreme legislative body, *i.e.* a body which can make or unmake every law; and which, therefore, cannot be bound by any law. This is, from a legal point of view, the true conception of a sovereign, and the ease with which the theory of absolute sovereignty has been accepted by English jurists is due to the peculiar history of English constitutional law. So far, therefore, from its being true that the sovereignty of Parliament is a deduction from abstract theories of jurisprudence, a critic would come nearer the truth who asserted that Austin's theory of sovereignty is suggested by the position of the English Parliament, just as Austin's analysis of the term "law" is at bottom an analysis of a typical law, namely, an English criminal statute.

It should, however, be carefully noted that the term "sovereignty," as long as it is accurately employed in the sense in which Austin sometimes<sup>1</sup> uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit.

<sup>1</sup> Cf. Austin, *op. cit.*, vol. i, p. 268.

If the term "sovereignty" be thus used, the sovereign power under the English constitution is clearly "Parliament." But the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is "politically" sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run<sup>1</sup> always enforce their will. But the courts will take no notice of the will

<sup>1</sup> The working of a constitution is greatly affected by the rate at which the will of the political sovereign can make itself felt. In this matter we may compare the constitutions of the United States, of the Swiss Confederacy, and of the United Kingdom respectively. In each case the people of the country, or to speak more accurately the electorate, are politically sovereign. The action of the people of the United States in changing the Federal Constitution is impeded by many difficulties, and is practically slow; the Federal Constitution has, except after the civil war, not been materially changed during the century which has elapsed since its formation. The Articles of the Swiss Confederation admit of more easy change than the Articles of the United States Constitution, and since 1848 have undergone considerable modification. But though in one point of view the constitution,

## Part I.

of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word "sovereignty" is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some part of his work Austin has apparently confused the one sense with the other.

"Adopting the language," he writes, "of most of the writers who have treated of the British constitution, I commonly suppose that the present parliament, or the parliament for the time being, is possessed of the sovereignty: or I commonly suppose that the King and the Lords, with the members of the Commons' house, form a tripartite body which is sovereign or supreme. But, speaking accurately, the members of the Commons' house are merely trustees

which was revised in 1874, may be considered a new constitution, it does not differ fundamentally from that of 1848. As things now stand, the people of England can change any part of the law of the constitution with extreme rapidity. Theoretically there is no check on the action of Parliament whatever, and it may be conjectured that in practice any change however fundamental would be at once carried through, which was approved of by one House of Commons, and, after a dissolution of Parliament, was supported by the newly elected House. But it is to be noted that by means of the *initiative constitutionnelle* the Swiss electorate can change the constitution itself. If a change proposed by 50,000 electors receives the approval of a majority of the electors and a majority of the Cantons, it becomes part of the constitution. Thus the Swiss Constitution can be changed by the people without waiting, as in the United Kingdom, for a change of Government, *e.g.* a right to poor relief could by means of the *initiative constitutionnelle* be added to the constitution without a change of Government.



“for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*. It were absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed: to suppose, for example, that the Commons empower their representatives in parliament to relinquish their share in the sovereignty to the King and the Lords.”<sup>1</sup>

Austin owns that the doctrine here laid down by him is inconsistent with the language used by writers who have treated of the British constitution. It is further absolutely inconsistent with the validity of the Septennial Act. Nothing is more certain than that no English judge ever conceded, or, under the present constitution, can concede, that Parliament is in any legal sense a “trustee”<sup>2</sup> for the electors. Of such a feigned “trust” the courts know nothing. The plain truth is that as a matter of law Parliament is the sovereign power in the state, and that the “supposition” treated by Austin as inaccurate is the correct statement of a legal fact which forms the basis of our whole legislative and judicial system. It is, however, equally true that in a political sense the electors are

<sup>1</sup> Austin, *Jurisprudence* (4th ed., 1879), vol. i, p. 253.

<sup>2</sup> This Austin concedes, but the admission is fatal to the contention that Parliament is not in strictness a sovereign. (See *ibid.*, pp. 252, 253.)

Part I. the most important part of, we may even say are actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience. The language therefore of Austin is as correct in regard to "political" sovereignty as it is erroneous in regard to what we may term "legal" sovereignty. The electors are a part of and the predominant part of the politically sovereign power. But the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament.

It may be conjectured that the error of which (from a lawyer's point of view) Austin has been guilty arises from his feeling, as every person must feel who is not the slave to mere words, that Parliament is (as already pointed out<sup>1</sup>) nothing like an omnipotent body, but that its powers are practically limited in more ways than one. And this limitation Austin expresses, not very happily, by saying that the members of the House of Commons are subject to a trust imposed upon them by the electors. This, however, leads us to our second difficulty, namely, the coexistence of parliamentary sovereignty with the fact of actual limitations on the power of Parliament.

Existence of actual limitations to power not inconsistent with sovereignty

As to the actual limitations on the sovereign power of Parliament.—The actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations. Of these the one is an external, the other is an internal limitation.

External limit.

The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects,

<sup>1</sup> See p. 71, *ante*.

or a large number of them, will disobey or resist his laws.

Chapter  
I.

This limitation exists even under the most despotic monarchies. A Roman Emperor, or a French King during the middle of the eighteenth century, was (as is the Russian Czar at the present day) in strictness a "sovereign" in the legal sense of that term. He had absolute legislative authority. Any law made by him was binding, and there was no power in the empire or kingdom which could annul such law. It may also be true,—though here we are passing from the legal to the political sense of sovereignty,—that the will of an absolute monarch is in general obeyed by the bulk of his subjects. But it would be an error to suppose that the most absolute ruler who ever existed could in reality make or change every law at his pleasure. That this must be so results from considerations which were long ago pointed out by Hume. Force, he teaches, is in one sense always on the side of the governed, and government therefore in a sense always depends upon opinion. "Nothing," he writes, "appears more surprising to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we inquire by what means this wonder is effected, we shall find, that, as force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular. The

## Part I.

"Soldan of Egypt, or the Emperor of Rome, might drive his harmless subjects, like brute beasts, against their sentiments and inclination: But he must, at least, have led his *mamelukes* or *prætorian bands*, like men, by their opinion."<sup>1</sup>

Illustrations of external limit on exercise of sovereign power.

The authority, that is to say, even of a despot, depends upon the readiness of his subjects or of some portion of his subjects to obey his behests; and this readiness to obey must always be in reality limited. This is shown by the most notorious facts of history. None of the early Cæsars could at their pleasure have subverted the worship or fundamental institutions of the Roman world, and when Constantine carried through a religious revolution his success was due to the sympathy of a large part of his subjects. The Sultan could not abolish Mahommedanism. Louis the Fourteenth at the height of his power could revoke the Edict of Nantes, but he would have found it impossible to establish the supremacy of Protestantism, and for the same reason which prevented James the Second from establishing the supremacy of Roman Catholicism. The one king was in the strict sense despotic; the other was as powerful as any English monarch. But the might of each was limited by the certainty of popular disobedience or opposition. The unwillingness of subjects to obey may have reference not only to great changes, but even to small matters. The French National Assembly of 1871 was emphatically the sovereign power in France. The majority of its members were (it is said) prepared for a monarchical restoration, but they were not prepared to restore the white flag: the army which would have acquiesced in

<sup>1</sup> Hume, *Essays, Moral, Political and Literary* (1875 ed.), vol. i, pp. 109, 110.

the return of the Bourbons, would not (it was anticipated) tolerate the sight of an anti-revolutionary symbol: "the *chassepots* would go off of themselves." Here we see the precise limit to the exercise of legal sovereignty; and what is true of the power of a despot or of the authority of a constituent assembly is specially true of the sovereignty of Parliament; it is limited on every side by the possibility of popular resistance. Parliament might legally establish an Episcopal Church in Scotland; Parliament might legally tax the Colonies; Parliament might without any breach of law change the succession to the throne or abolish the monarchy; but every one knows that in the present state of the world the British Parliament will do none of these things. In each case widespread resistance would result from legislation which, though legally valid, is in fact beyond the stretch of Parliamentary power. Nay, more than this, there are things which Parliament has done in other times, and done successfully, which a modern Parliament would not venture to repeat. Parliament would not at the present day prolong by law the duration of an existing House of Commons. Parliament would not without great hesitation deprive of their votes large classes of Parliamentary electors; and, speaking generally, Parliament would not embark on a course of reactionary legislation; persons who honestly blame Catholic Emancipation and lament the disestablishment of the Irish Church do not dream that Parliament could repeal the statutes of 1829 or of 1869. These examples from among a score are enough to show the extent to which the theoretically boundless sovereignty of Parliament is curtailed by the external limit to its exercise.



## Part I.

Internal  
limit.  
Illustra-  
tions.

The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs. The Sultan could not if he would change the religion of the Mahommedan world, but if he could do so it is in the very highest degree improbable that the head of Mahommedanism should wish to overthrow the religion of Mahomet; the internal check on the exercise of the Sultan's power is at least as strong as the external limitation. People sometimes ask the idle question why the Pope does not introduce this or that reform? The true answer is that a revolutionist is not the kind of man who becomes a Pope, and that the man who becomes a Pope has no wish to be a revolutionist. Louis the Fourteenth could not in all probability have established Protestantism as the national religion of France; but to imagine Louis the Fourteenth as wishing to carry out a Protestant reformation is nothing short of imagining him to have been a being quite unlike the *Grand Monarque*. Here again the internal check works together with the external check, and the influence of the internal limitation is as great in the case of a Parliamentary sovereign as of any other; perhaps it is greater. Parliament could not prudently tax the Colonies; but it is hardly conceivable that a modern Parliament, with the history of the eighteenth century before its eyes, should wish to tax the Colonies. The combined influence both of the external and of the internal limitation on legislative

sovereignty is admirably stated in Leslie Stephen's *Science of Ethics*, whose chapter on "Law and Custom" contains one of the best statements to be met with of the limits placed by the nature of things on the theoretical omnipotence of sovereign legislatures.

Chapter ·  
I.

"Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it."<sup>1</sup>

Though sovereign power is bounded by an external and an internal limit, neither boundary is very definitely marked, nor need the two precisely coincide. A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance, and it is on many accounts worth

Limits  
may not  
coincide.

<sup>1</sup> Stephen, *Science of Ethics* (1882), p. 143; cf. Jennings, *op. cit.*, p. 139. "Parliament passes many laws which many people do not want. But it never passes any laws which any substantial section of the population violently dislikes."—ED.

## Part I.

observation that the exact point at which the external limitation begins to operate, that is, the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision. It would be rash of the Imperial Parliament to abolish the Scotch law courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scotch resistance to such a change would become serious. Before the War of Secession the sovereign power of the United States could not have abolished slavery without provoking a civil war; after the War of Secession the sovereign power abolished slavery and conferred the electoral franchise upon the Blacks without exciting actual resistance.

Representa-  
tive  
government  
produces  
coincidence  
between  
external  
and internal  
limit.

In reference to the relation between the external and the internal limit to sovereignty, representative government presents a noteworthy peculiarity. It is this. The aim and effect of such government is to produce a coincidence, or at any rate diminish the divergence, between the external and the internal limitations on the exercise of sovereign power. Frederick the Great may have wished to introduce, and may in fact have introduced, changes or reforms opposed to the wishes of his subjects. Louis Napoleon certainly began a policy of free trade which would not be tolerated by an assembly which truly represented French opinion. In these instances neither monarch reached the external limit to his sovereign power, but it might very well have happened that he might have reached it, and have thereby provoked serious resistance on the part of his subjects. There might, in short, have arisen a divergence between the internal and the external check.

The existence of such a divergence, or (in other words) of a difference between the permanent wishes of the sovereign, or rather of the King who then constituted a predominant part of the sovereign power, and the permanent wishes of the nation, is traceable in England throughout the whole period beginning with the accession of James the First and ending with the Revolution of 1688. The remedy for this divergence was found in a transference of power from the Crown to the Houses of Parliament; and in placing on the throne rulers who from their position were induced to make their wishes coincide with the will of the nation expressed through the House of Commons; the difference between the will of the sovereign and the will of the nation was terminated by the foundation of a system of real representative government. Where a Parliament truly represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises, must soon disappear. Speaking roughly, the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of the English people usually desire. To prevent the divergence between the wishes of the sovereign and the wishes of subjects is in short the effect, and the only certain effect, of *bonâ fide* representative government. For our present purpose there is no need to determine whether this result be good or bad. An enlightened sovereign has more than once carried out reforms in advance of the wishes of his subjects. This is true

Part I. both of sovereign kings and, though more rarely, of sovereign Parliaments. But the sovereign who has done this, whether King or Parliament, does not in reality represent his subjects.<sup>1</sup> All that it is here necessary to insist upon is that the essential property of representative government is to produce coincidence between the wishes of the sovereign and the wishes of the subjects; to make, in short, the two limitations on the exercise of sovereignty absolutely coincident. This, which is true in its measure of all real representative government, applies with special truth to the English House of Commons.

"The House of Commons," writes Burke, "was supposed originally to be *no part of the standing government of this country*. It was considered as a *control*, issuing *immediately* from the people, and speedily to be resolved into the mass from whence it arose. In this respect it was in the higher part of government what juries are in the lower. The capacity of a magistrate being transitory, and that of a citizen permanent, the latter capacity it was hoped would of course preponderate in all discussions, not only between the people and the standing authority of the Crown, but between the people and the fleeting authority of the House of Commons itself. It was hoped that, being of a middle nature between subject and government, they would feel with a more tender and a nearer interest everything that concerned the people, than the other remoter and more permanent parts of legislature.

"Whatever alterations time and the necessary accommodation of business may have introduced, this character can never be sustained, unless the House of

<sup>1</sup> Cf. Dicey, *Law and Opinion in England* (2nd ed., 1914), pp. 4, 5.



“ Commons shall be made to bear some stamp of the  
“ actual disposition of the people at large. It would  
“ (among public misfortunes) be an evil more natural and  
“ tolerable, that the House of Commons should be in-  
“ fected with every epidemical phrensy of the people,  
“ as this would indicate some consanguinity, some sym-  
“ pathy of nature with their constituents, than that they  
“ should in all cases be wholly untouched by the opinions  
“ and feelings of the people out of doors. By this  
“ want of sympathy they would cease to be a House  
“ of Commons.”<sup>1</sup>

<sup>1</sup> *The Works of Edmund Burke* (1808 ed.), vol. ii, pp. 287, 288.



## CHAPTER II

### PARLIAMENT AND NON-SOVEREIGN LAW-MAKING BODIES

IN my last chapter I dwelt upon the nature of Parliamentary sovereignty; my object in this chapter is to illustrate the characteristics of such sovereignty by comparing the essential features of a sovereign Parliament like that of England with the traits which mark non-sovereign law-making bodies.

Chapter  
II.  
Aim of  
chapter.

A. *Characteristics of Sovereign Parliament.*—The characteristics of Parliamentary sovereignty may be deduced from the term itself. But these traits are apt to escape the attention of Englishmen, who have been so accustomed to live under the rule of a supreme legislature, that they almost, without knowing it, assume that all legislative bodies are supreme, and hardly therefore keep clear before their minds the properties of a supreme as contrasted with a non-sovereign law-making body. In this matter foreign observers are, as is natural, clearer-sighted than Englishmen. De Lolme, Gneist, and de Tocqueville seize at once upon the sovereignty of Parliament as a salient feature of the English constitution, and recognise the far-reaching effects of this marked peculiarity in our institutions.

Parlia-  
mentary  
sove-  
reignty.

## Part I.

“In England,” writes de Tocqueville, “the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly.”<sup>1</sup>

His expressions are wanting in accuracy, and might provoke some criticism, but the description of the English Parliament as at once “a legislative and a constituent assembly” supplies a convenient formula for summing up the fact that Parliament can change any law whatever. Being a “legislative” assembly it can make ordinary laws, being a “constituent” assembly it can make laws which shift the basis of the constitution. The results which ensue from this fact may be brought under three heads.

No law  
Parliament  
cannot  
change.

*First*, There is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.

A Bill for reforming the House of Commons, a Bill for abolishing the House of Lords, a Bill to give London a municipality, a Bill to make valid marriages celebrated by a pretended clergyman, who is found after their celebration not to be in orders, are each equally within the competence of Parliament, they each may be passed in substantially the same manner, they none of them when passed will be, legally

<sup>1</sup> de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. i (*Démocratie en Amérique*), pp. 166, 167.

speaking, a whit more sacred or immutable than the others, for they each will be neither more nor less than an Act of Parliament, which can be repealed as it has been passed by Parliament, and cannot be annulled by any other power.

*Secendly*, There is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional. The very language therefore, expressing the difference between a "legislative" assembly which can change ordinary laws and a "constituent" assembly which can change not only ordinary but also constitutional and fundamental laws, has to be borrowed from the political phraseology of foreign countries.

No distinction between constitutional and ordinary laws.

This absence of any distinction between constitutional and ordinary laws has a close connection with the non-existence in England of any written or enacted constitutional statute or charter. de Tocqueville indeed, in common with other writers, apparently holds the unwritten character of the British constitution to be of its essence : " L'Angleterre n'ayant point de constitution écrite, qui peut dire qu'on change sa constitution ? " <sup>1</sup> But here de Tocqueville falls into an error, characteristic both of his nation and of the weaker side of his own rare genius. He has treated the form of the constitution as the cause of its substantial qualities, and has inverted the relation of cause and effect. The constitution, he seems to have thought, was changeable because it was not reduced to a written or statutory form. It is far nearer the truth to assert that the constitution has never

Relation between Parliamentary sovereignty and an unwritten constitution.

<sup>1</sup> de Tocqueville, *op. cit.*, p. 312.



Part I. been reduced to a written or statutory form because each and every part of it is changeable at the will of Parliament. When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing, or, to use English phraseology, is enacted as a statute. Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution. One main reason then why constitutional laws have not in England been recognised under that name, and in many cases have not been reduced to the form of a statutory enactment, is that one law, whatever its importance, can be passed and changed by exactly the same method as every other law. But it is a mistake to think that the whole law of the English constitution might not be reduced to writing and be enacted in the form of a constitutional code. The Belgian constitution indeed comes very near to a written reproduction of the English constitution, and the constitution of England might easily be turned into an Act of Parliament without suffering any material transformation of character, provided only that the English Parliament retained—what the Belgian Parliament, by the way, does not possess—the unrestricted power of repealing or amending the constitutional code.

*Thirdly,* There does not exist in any part of the

British Empire any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except, of course, its being repealed by Parliament.

Chapter  
II.

No person  
entitled to  
pronounce  
Act of Par-  
liament  
void.

These then are the three traits of Parliamentary sovereignty as it exists in England: first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.

These traits are all exemplifications of the quality which my friend Mr. Bryce has happily denominated the "flexibility"<sup>1</sup> of the British constitution. Every part of it can be expanded, curtailed, amended, or abolished, with equal ease. It is the most flexible polity in existence, and is therefore utterly different in character from the "rigid" constitutions (to use another expression of Mr. Bryce's) the whole or some part of which can be changed only by some extraordinary method of legislation.

Flexibility  
of the con-  
stitution.

B. *Characteristics of non-sovereign law-making bodies.*—From the attributes of a sovereign legislature it is possible to infer negatively what are the characteristics all (or some) of which are the marks of a non-sovereign law-making body, and which therefore

Character-  
istics of  
non-  
sovereign  
law-  
making  
bodies.

<sup>1</sup> See Bryce, *Studies in History and Jurisprudence* (1901), vol. i, Essay iii, Flexible and Rigid Constitutions.

Part I. may be called the marks or notes of legislative subordination.

These signs by which you may recognise the subordination of a law-making body are, first, the existence of laws affecting its constitution which such body must obey and cannot change; hence, secondly, the formation of a marked distinction between ordinary laws and fundamental laws; and lastly, the existence of some person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body.

Wherever any of these marks of subordination exist with regard to a given law-making body, they prove that it is not a sovereign legislature.

Observe the use of the words "law-making body."

This term is here employed as an expression which may include under one head<sup>1</sup> both municipal bodies,

<sup>1</sup> This inclusion has been made the subject of criticism, and see also Intro. pp. liii *et seq.* *ante.*

The author said: "The objections taken to it are apparently threefold.

"*First*, There is, it is said, a certain absurdity in bringing into one class things so different in importance and in dignity as, for example, the Belgian Parliament and an English School-board. This objection rests on a misconception. It would be ridiculous to overlook the profound differences between a powerful legislature and a petty corporation. But there is nothing ridiculous in calling attention to the points which they have in common. The sole matter for consideration is whether the alleged similarity be real. No doubt when features of likeness between things which differ from one another both in appearance and in dignity are pointed out, the immediate result is to produce a sense of amusement, but the apparent absurdity is no proof that the likeness is unreal or undeserving of notice. A man differs from a rat. But this does not make it the less true or the less worth noting that they are both vertebrate animals.

"*Secondly*, The powers of an English corporation, it is urged, can in generally only be exercised reasonably, and any exercise of them is invalid which is not reasonable, and this is not true of the laws made, *e.g.*, by the Parliament of a British colony.

Meaning of  
term "law-  
making  
body."

such as railway companies, school-boards, town councils, and the like, which possess a limited power of making laws, but are not ordinarily called legislatures, and bodies such as the Parliaments of the British Colonies, of Belgium, or of France, which are ordinarily called "legislatures," but are not in reality sovereign bodies.

The reason for grouping together under one name

"This objection admits of more than one reply. It is not universally true that the by-laws made by a corporation are invalid unless they are reasonable. But let it be assumed for the sake of argument that this restriction is always, as it certainly is often, imposed on the making of by-laws. This concession does not involve the consequence that by-laws do not partake of the nature of laws. All that follows from it is a conclusion which nobody questions, namely, that the powers of a non-sovereign law-making body may be restricted in very different degrees.

"*Thirdly*, The by-laws of a corporation are, it is urged, not laws, because they affect only certain persons, *e.g.* in the case of a railway company the passengers on the railway, and do not, like the laws of a colonial legislature, affect all persons coming under the jurisdiction of the legislature; or to put the same objection in another shape, the by-laws of a railway company apply, it is urged, only to persons using the railway, in addition to the general law of the land by which such persons are also bound, whereas the laws, *e.g.*, of the New Zealand Parliament constitute the general law of the colony.

"The objection is plausible, but does not really show that the similarity insisted upon between the position of a corporation and, *e.g.*, a colonial legislature is unreal. In either case the laws made, whether by the corporation or by the legislature, apply only to a limited class of persons, and are liable to be overridden by the laws of a superior legislature. Even in the case of a colony so nearly independent as New Zealand, the inhabitants are bound first by the statutes of the Imperial Parliament, and in addition thereto by the Acts of the New Zealand Parliament. The very rules which are by-laws when made by a corporation would admittedly be laws if made directly by Parliament. Their character cannot be changed by the fact that they are made by the permission of Parliament through a subordinate legislative body. The Council of a borough, which for the present purpose is a better example of my meaning than a railway company, passes in accordance with the powers conferred upon it by Parliament a by-law prohibiting processions with music on Sunday. The same prohibition if contained in an Act of Parliament would be admittedly a law. It is none the less a law because made by a body which is permitted by Parliament to legislate."

**Part I.** such very different kinds of "law-making" bodies is, that by far the best way of clearing up our ideas as to the nature of assemblies which, to use the foreign formula,<sup>1</sup> are "legislative" without being "constituent," and which therefore are not sovereign legislatures, is to analyse the characteristics of societies, such as English railway companies, which possess a certain legislative authority, though the authority is clearly delegated and subject to the obvious control of a superior legislature.

It will conduce to clearness of thought if we divide non-sovereign law-making bodies into the two great classes of obviously subordinate bodies such as corporations, the Council of India, etc., and such legislatures of independent countries as are legislative without being constituent, *i.e.* are non-sovereign legislative bodies.

The consideration of the position of the non-sovereign legislatures which exist under the complicated form of constitution known as a federal government is best reserved for a separate chapter.<sup>2</sup>

### I. Subordinate Law-making Bodies.<sup>3</sup>

Subordin-  
ate bodies.

Corpora-  
tions.

(i.) *Corporations*.—An English railway company is as good an example as can be found of a subordinate law-making body. Such a company is in the strictest sense a law-making society, for it can under the powers of its Act make laws (called by-laws) for the regulation (*inter alia*) of travelling upon the railway,<sup>4</sup>

<sup>1</sup> See p. 88, *ante*.

<sup>2</sup> See ch. iii, *post*.

<sup>3</sup> Cf. Jennings and Young, *The Constitutional Laws of the British Empire* (1938), pp. 29-32.

<sup>4</sup> See especially the Railways Clauses Consolidation Act, 1845. This



and can impose a penalty for the breach of such laws, which can be enforced by proceedings in the courts. The rules therefore or by-laws made by a company within the powers of its Act are "laws" in the strictest sense of the term, as any person will discover to his own cost who, when he travels by rail from Oxford to Paddington, deliberately violates a by-law duly made by the Great Western Railway Company.

But though an English railway company is clearly a law-making body, it is clearly a non-sovereign law-making body. Its legislative power bears all the marks of subordination.

*First*, The company is bound to obey laws and (amongst others) the Act of Parliament creating the company, which it cannot change. This is obvious, and need not be insisted upon.

*Secondly*, There is the most marked distinction between the Act constituting the company, not a line of which can be changed by the company, and the by-laws which, within the powers of its Act, the company can both make and change. Here we have on a very small scale the exact difference between constitutional laws which cannot, and ordinary laws which can, be changed by a subordinate legislature, i.e. by the company. The company, if we may apply to it the terms of constitutional law, is not a constituent, but is within certain limits a legislative assembly; and these limits are fixed by the constitution of the company.

*Thirdly*, The courts have the right to pronounce, and indeed are bound to pronounce, on the validity

Act is incorporated in the special Act constituting the company. Its provisions therefore form part of the constitution of a railway company.

Part I. of the company's by-laws ; that is, upon the validity, or to use political terms, on the constitutionality of the laws made by the company as a law-making body. Note particularly that it is not the function of any court or judge to declare void or directly annul a by-law made by a railway company. The function of the court is simply, upon any particular case coming before it which depends upon a by-law made by a railway company, to decide for the purposes of that particular case whether the by-law is or is not within the powers conferred by Act of Parliament upon the company ; that is to say, whether the by-law is or is not valid, and to give judgment in the particular case according to the court's view of the validity of the by-law. It is worth while to examine with some care the mode in which English judges deal with the inquiry whether a particular by-law is or is not within the powers given to the company by Act of Parliament, for to understand this point goes a good way towards understanding the exact way in which English or American courts determine the constitutionality of Acts passed by a non-sovereign legislature.

The London and North-Western Railway Company made a by-law by which " any person travelling without the special permission of some duly authorised servant of the company in a carriage or by a train of a superior class to that for which his ticket was issued is hereby subject to a penalty not exceeding forty shillings, and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling from the station where the train originally started, unless he shows that he had no intention to defraud." X, with the intention of defrauding the

company, travelled in a first-class carriage instead of a second-class carriage for which his ticket was issued, and having been charged under the by-law was convicted in the penalty of ten shillings, and costs. On appeal by *X*, the court determined that the by-law which attempted to shift the burden of proof on to the accused was illegal and void as being repugnant to 8 Vict. c. 20, s. 103, which made proof of fraudulent intent the gist of the offence, or in effect to the terms of the Act incorporating the company,<sup>1</sup> and that therefore *X* could not be convicted of the offence charged against him.

A by-law of the South-Eastern Railway Company required that a passenger should deliver up his ticket to a servant of the company when required to do so, and that any person travelling without a ticket or failing or refusing to deliver up his ticket should be required to pay the fare from the station whence the train originally started to the end of his journey. *X* had a railway ticket enabling him to travel on the South-Eastern Railway. Having to change trains and pass out of the company's station he was asked to show his ticket, and refused to do so, but without any fraudulent intention. He was summoned for a breach of the by-law, and convicted in the amount of the fare from the station whence the train started. The Queen's Bench Division held the conviction wrong on the ground that the by-law was for several reasons invalid, as not being authorised by the Act under which it purported to be made.<sup>2</sup>

<sup>1</sup> *Dyson v. L. & N.W. Ry. Co.* (1881) 7 Q.B.D. 32.

<sup>2</sup> *Saunders v. S.E. Ry. Co.* (1880) 5 Q.B.D. 456. Cf. *Bentham v. Hoyle* (1878) 3 Q.B.D. 289 and *The London and Brighton Ry. Co. v. Watson* (1878) 3 C.P.D. 429; on appeal (1879) 4 C.P.D. 118.

**Part I.**

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Now in these instances, and in other cases where the courts pronounce upon the validity of a by-law made by a body (*e.g.* a railway company or a school-board) having powers to make by-laws enforceable by penalties, it is natural to say that the courts pronounce the by-laws valid or invalid. But this is not strictly the case. What the judges determine is not that a particular by-law is invalid, for it is not the function of the courts to repeal or annul the by-laws made by railway companies, but that in a proceeding to recover a penalty from *X* for the breach of a by-law judgment must be given on the basis of the particular by-law being beyond the powers of the company, and therefore invalid. It may indeed be thought that the distinction between annulling a by-law and determining a case upon the assumption of such by-law being void is a distinction without a difference. But this is not so. The distinction is not without importance even when dealing with the question whether *X*, who is alleged to have broken a by-law made by a railway company, is liable to pay a fine; it is of first rate importance when the question before the courts is one involving considerations of constitutional law, as for example when the Privy Council is called upon, as constantly happens, to determine cases which involve the validity or constitutionality of laws made by the Dominion Parliament or by one of the provincial Parliaments of Canada. The significance, however, of the distinction will become more apparent as we proceed with our subject; the matter of consequence now is to notice the nature of the distinction, and to realise that when a court in deciding a given case considers whether

a by-law is, or is not, valid, the court does a different thing from affirming or annulling the by-law itself.

Chapter  
II.

(ii.) *Legislative Council of British India.*<sup>1</sup>—Laws are made for British India by a Legislative Council having very wide powers of legislation. This Council, or, as it is technically expressed, the "Governor-General in Council," can pass laws as important as any Acts passed by the British Parliament. But the authority of the Council in the way of law-making is as completely subordinate to, and as much dependent upon, Acts of Parliament as is the power of the London and North-Western Railway Company to make by-laws.

Council of  
British  
India.

The legislative powers of the Governor-General and his Council arise from definite Parliamentary enactments.<sup>2</sup> These Acts constitute what may be termed as regards the Legislative Council the constitution of India. Now observe, that under these Acts the Indian Council is in the strictest sense a non-sovereign legislative body, and this independently of the fact that the laws or regulations made by the Governor-General in Council can be annulled or disallowed by the Crown; and note that the position of the Council exhibits all the marks or notes of legislative subordination.

<sup>1</sup> See Ilbert, *Government of India* (3rd ed., 1915), pp. 224-240, Digest of Statutory Enactments, secs. 60-69.

It is perhaps superfluous to state that the paragraphs which follow are based upon Indian constitutional law which has since been repealed. The present government of the provinces of British India is regulated by the Government of India Act, 1935, which introduced cabinet government. Pending federation with the Native States that part of the Act which relates to the Central Government remains inoperative. The Central Government, therefore, is subject to the Government of India Acts, 1915, and 1919.—ED.

<sup>2</sup> Government of India Act, 1833, ss. 45-48, 51, 52; Indian Councils Act, 1861, ss. 16-25; Government of India Act, 1865.



Part I.

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*First*, The Council is bound by a large number of rules which cannot be changed by the Indian legislative body itself, and which can be changed by the superior power of the Imperial Parliament.

*Secondly*, The Acts themselves from which the Council derives its authority cannot be changed by the Council, and hence in regard to the Indian legislative body form a set of constitutional or fundamental laws, which, since they cannot be changed by the Council, stand in marked contrast with the laws or regulations which the Council is empowered to make. These fundamental rules contain, it must be added, a number of specific restrictions on the subjects with regard to which the Council may legislate. Thus the Governor-General in Council has no power of making laws which may affect the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of India.<sup>1</sup>

*Thirdly*, The courts in India (or in any other part of the British Empire) may, when the occasion arises, pronounce upon the validity or constitutionality of laws made by the Indian Council.

The courts treat Acts passed by the Indian Council precisely in the same way in which the King's Bench Division treats the by-laws of a railway company. No judge in India or elsewhere ever issues a decree which declares invalid, annuls, or makes void a law or regulation made by the Governor-General in Council. But when any particular case comes before

<sup>1</sup> Indian Councils Act, 1861, s. 22.

the courts, whether civil or criminal, in which the rights or liabilities of any party are affected by the legislation of the Indian Council, the court may have to consider and determine with a view to the particular case whether such legislation was or was not within the legal powers of the Council, which is of course the same thing as adjudicating as regards the particular case in hand upon the validity or constitutionality of the legislation in question. Thus suppose that *X* is prosecuted for the breach of a law or regulation passed by the Council, and suppose the fact to be established past a doubt that *X* has broken this law. The court before which the proceedings take place, which must obviously in the ordinary course of things be an Indian court, may be called upon to consider whether the regulation which *X* has broken is within the powers given to the Indian Council by the Acts of Parliament making up the Indian constitution. If the law is within such powers, or, in other words, is constitutional, the court will by giving judgment against *X* give full effect to the law, just as effect is given to the by-law of a railway company by the tribunal before whom an offender is sued pronouncing judgment against him for the penalty. If, on the other hand, the Indian Court deem that the regulation is *ultra vires* or unconstitutional, they will refuse to give effect to it, and treat it as void by giving judgment for the defendant on the basis of the regulation being invalid or having no legal existence. On this point the *Empress v. Burah and Book Singh*<sup>1</sup> is most instructive. The details of the case are immaterial; the noticeable thing is that the High

<sup>1</sup> (1877) 3 Ind. L.R. (Calcutta Series) 63.

## Part I.

court held a particular legislative enactment of the Governor-General in Council to be in excess of the authority given to him by the Imperial Parliament and therefore invalid, and on this ground entertained an appeal from two prisoners which, if the enactment had been valid, the court would admittedly have been incompetent to entertain. The Privy Council, it is true, held on appeal<sup>1</sup> that the particular enactment was within the legal powers of the Council and therefore valid, but the duty of the High Court of Calcutta to consider whether the legislation of the Governor-General was or was not constitutional, was not questioned by the Privy Council. To look at the same thing from another point of view, the courts in India treat the legislation of the Governor-General in Council in a way utterly different from that in which any English court can treat the Acts of the Imperial Parliament. An Indian tribunal may be called upon to say that an Act passed by the Governor-General need not be obeyed because it is unconstitutional or void. No British court can give judgment, or ever does give judgment, that an Act of Parliament need not be obeyed because it is unconstitutional. Here, in short, we have the essential difference between subordinate and sovereign legislative power.<sup>2</sup>

(iii.) *English Colonies with Representative and Responsible Governments.*—Many English colonies, and notably the Dominion of New Zealand (to which country our attention had best for the sake of

<sup>1</sup> *The Queen v. Burah* (1878) 3 App. Cas. 889.

<sup>2</sup> See especially *The Empress v. Burah and Book Singh* (1877) 3 Ind. L.R. (Calcutta Series) 63, at pp. 86-89, per Markby, J.

clearness be specially directed), possess representative assemblies which occupy a somewhat peculiar position. Chapter  
II.

The Parliament of the Dominion of New Zealand exercises throughout that country many of the ordinary powers of a sovereign assembly, such as the Parliament of the United Kingdom.<sup>1</sup> It makes and repeals laws, it puts Ministries in power and dismisses them from office, it controls the general policy of the New Zealand Government, and generally makes its will felt in the transaction of affairs after the manner of the Parliament at Westminster. An ordinary observer would, if he looked merely at the everyday proceedings of the New Zealand legislature, find no Powers  
exercised  
by colonial  
Parli-  
aments.

<sup>1</sup> New Zealand is now a Dominion; it has not, however, as yet adopted ss. 2-6 of the Statute of Westminster, which *inter alia* repeal the Colonial Laws Validity Act, 1865, in its application to the Dominions, and give power to a Dominion to enact legislation with extra-territorial effect. Its legislative autonomy, therefore, still rests upon the convention of non-interference which has long been regarded as binding by the Government and Parliament of the United Kingdom.

The author stated at this point that "no colonial legislature has as such any authority beyond the territorial limits of the colony." This has never been formally decided by the Judicial Committee, though there is persuasive authority in the case of *Macleod v. Attorney-General of New South Wales* [1891] A.C. 455; J. & Y., 80; see generally J. & Y., 34, 35. In various cases it has been held that the scope of a colonial enactment could operate beyond the limits of the Colony or Dominion so far as it purported to enact provisions ancillary to the maintenance of peace, order and good government. For example in *Croft v. Dunphy* [1933] A.C. 156; J. and Y. 87; the validity of a Canadian statute which authorised the seizure of vessels outside the territorial waters of Canada was held valid. Such seizure was necessarily ancillary to the enforcement of the customs laws of the Dominion. The author correctly pointed out that in various instances Imperial Acts have expressly given extended powers of legislation to colonial legislatures to enable the enactment of laws on a specified topic to operate beyond the limits of the colony, e.g. the Merchant Shipping Act, 1894, ss. 478, 735, 736. As to the last two sections, see now section 5 of the Statute of Westminster in the case of those Dominions which have adopted the section.—Ed.

Part I. reason to pronounce it a whit less powerful within its sphere than the Parliament of the United Kingdom. No doubt the assent of the Governor is needed in order to turn colonial Bills into laws; and further investigation would show our inquirer that for the validity of any colonial Act there is required, in addition to the assent of the Governor, the sanction, either express or implied, of the Crown. But these assents are constantly given almost as a matter of course, and may be compared (though not with absolute correctness) to the Crown's so-called "veto" or right of refusing assent to Bills which have passed through the Houses of Parliament.

Limit to  
powers.

Yet for all this, when the matter is further looked into, the Dominion Parliament (together with other colonial legislatures) will be found to be a non-sovereign legislative body, and bears decisive marks of legislative subordination. The action of the Dominion Parliament is restrained by laws which it cannot change, and are changeable only by the Imperial Parliament; and further, New Zealand Acts, even when assented to by the Crown, are liable to be treated by the courts in New Zealand and elsewhere throughout the British dominions as void or unconstitutional, on the ground of their coming into conflict with laws of the Imperial Parliament, which the colonial legislature has no authority to touch.<sup>1</sup>

<sup>1</sup> As also upon the ground of their being in strictness *ultra vires*, i.e. beyond the powers conferred upon the Dominion legislature. This is the ground why a colonial Act is in general void, in so far as it is intended to operate beyond the territory of the colony. "In 1879, the Supreme Court of New Zealand held that the Foreign Offenders Apprehension Act, 1863, of that colony, which authorises the deportation of persons charged with indictable misdemeanours in other



That this is so becomes apparent the moment we realise the exact relation between colonial and Imperial laws. The matter is worth some little examination, both for its own sake and for the sake of the light it throws on the sovereignty of Parliament.

The charter of colonial legislative independence is the Colonial Laws Validity Act, 1865.<sup>1</sup>

This statute seems (oddly enough) to have passed through Parliament without discussion; but it permanently defines and extends the authority of colonial legislatures, and its main provisions are of such importance as to deserve verbal citation:—

Colonial  
Laws  
Validity  
Act, 1865.

“Sec. 2. Any colonial law which is or shall be in  
“any respect repugnant to the provisions of any Act  
“of Parliament extending to the colony to which  
“such law may relate, or repugnant to any order or  
“regulation made under authority of such Act of  
“Parliament, or having in the colony the force and  
“effect of such Act, shall be read subject to such  
“Act, order, or regulation, and shall, to the extent of  
“such repugnancy, but not otherwise, be and remain  
“absolutely void and inoperative.

“3. No colonial law shall be or be deemed to  
“have been void or inoperative on the ground of

colonies, was beyond the competence of the New Zealand legislature, for it involved detention on the high seas, which the legislature could not authorise, as it could legislate only for peace, order, and good government within the limits of the colony.” Jenkyns, *British Rule and Jurisdiction beyond the Seas* (1902), p. 70, citing *In re Gleich* (1879) Ollivier, Bell and Fitzgerald's N.Z. Reports, S.C. 39; cf. Keith, *Responsible Government in the Dominions* (2nd ed., 1928), vol. 1, p. 329. This case is in conflict with *Attorney-General for Canada v. Cain* [1906] A.C. 542.

<sup>1</sup> See on this enactment, Jenkyns, *op. cit.*, pp. 71, 72; and Jennings and Young, *Constitutional Laws of the British Empire* (1938), pp. 31-35.

Part I.

"repugnancy to the law of England, unless the same  
 "shall be repugnant to the provisions of some such  
 "Act of Parliament, order, or regulation as afore-  
 "said.

"4. No colonial law, passed with the concurrence  
 "of or assented to by the Governor of any colony, or  
 "to be hereafter so passed or assented to, shall be or  
 "be deemed to have been void or inoperative, by  
 "reason only of any instructions with reference to  
 "such law or the subject thereof which may have  
 "been given to such Governor by or on behalf of  
 "Her Majesty, by any instrument other than the  
 "letters - patent or instrument authorising such  
 "Governor to concur in passing or to assent to  
 "laws for the peace, order, and good government  
 "of such colony, even though such instructions  
 "may be referred to in such letters-patent or last-  
 "mentioned instrument.

"5. Every colonial legislature shall have, and be  
 "deemed at all times to have had, full power within  
 "its jurisdiction to establish courts of judicature, and  
 "to abolish and reconstitute the same, and to alter the  
 "constitution thereof, and to make provision for the  
 "administration of justice therein; and every repre-  
 "sentative legislature<sup>1</sup> shall, in respect to the colony  
 "under its jurisdiction, have, and be deemed at all  
 "times to have had, full power to make laws re-  
 "specting the constitution, powers, and procedure  
 "of such legislature; provided that such laws shall  
 "have been passed in such manner and form<sup>2</sup> as may

<sup>1</sup> I.e. a colonial legislature of which at least one half of the members of one house are elected by the inhabitants of the colony.

<sup>2</sup> See *Attorney-General for New South Wales v. Trethowan* [1932] A.C. 526; J. & Y., 59; and Intro. p. lv, ante.

“from time to time be required by any Act of  
 “Parliament, letters-patent, order in council, or  
 “colonial law for the time being in force in the  
 “said colony.”

Chapter  
 II.

The importance, it is true, of the Colonial Laws Validity Act, 1865, may well be either exaggerated or quite possibly underrated. The statute is in one sense less important than it at first sight appears, because the principles laid down therein were, before its passing, more or less assumed, though with some hesitation, to be good law and to govern the validity of colonial legislation. From another point of view the Act is of the highest importance, because it determines, and gives legislative authority to, principles which had never before been accurately defined, and were liable to be treated as open to doubt.<sup>1</sup> In any case the terms of the enactment make it now possible to state with precision the limits which bound the legislative authority of a colonial Parliament.

The Dominion Parliament may make laws opposed to the English common law, and such laws (on receiving the required assents) are perfectly valid.

Thus a New Zealand Act which changed the common law rules as to the descent of property, which gave the Governor authority to forbid public meetings, or which abolished trial by jury, might be inexpedient or unjust, but would be a perfectly valid law, and would be recognised as such by every

<sup>1</sup> Up to 1865 the prevalent opinion in England seems to have been that any law seriously opposed to the principles of English law was repugnant to the law of England, and colonial laws were from time to time disallowed solely on the ground of such supposed repugnancy and invalidity. See *Report of Conference on Operation of Dominion Legislation*, 1929 (Cmd. 3479, 1930), pp. 17, 18; Keith, *The Sovereignty of the British Dominions* (1929), pp. 45, 46.

Part I. tribunal throughout the British Empire.<sup>1</sup>

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The Dominion Parliament, on the other hand, cannot make any laws inconsistent with any Act of Parliament, or with any part of an Act of Parliament, intended by the Imperial Parliament to apply to New Zealand.

Suppose, for example, that the Imperial Parliament were to pass an Act providing a special mode of trial in New Zealand for particular classes of offences committed there, no enactment of the colonial Parliament, which provided that such offences should be tried otherwise than as directed by the imperial statute, would be of any legal effect. So again, no New Zealand Act would be valid that legalised the slave trade in the face of the provisions of the Slave Trade Act, 1824, which prohibit slave trading throughout the British dominions; nor would Acts passed by the Dominion Parliament be valid which repealed, or invalidated, several provisions of the Merchant Shipping Act, 1894, meant to apply to the colonies, or which deprived a discharge under the English Bankruptcy Act of the effect which, in virtue of the imperial statute, it has as a release from debts contracted in any part whatever of the British dominions. No colonial legislature, in short, can override imperial legislation which is intended to apply to the colonies. Whether the intention be expressed in so many words, or be apparent only from the general scope and nature of the enactment, is immaterial. Once establish that an imperial law

<sup>1</sup> Assuming, of course, that such Acts are not inconsistent with any imperial statute applying to the colony. Cf. *Robinson v. Reynolds* (1867) *Macassey's N.Z. Reports* 562.

is intended to apply to a given colony, and the consequence follows that any colonial enactment which contravenes that law is invalid and unconstitutional.<sup>1</sup>

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Hence the courts in the Dominion of New Zealand, as also in the rest of the British Empire, may be called upon to adjudicate upon the validity or constitutionality of any Act of the Dominion Parliament. For if a New Zealand law really contradicts the provisions of an Act of Parliament extending to New Zealand, no court throughout the British dominions could legally, it is clear, give effect to the enactment of the Dominion Parliament. This is an inevitable result of the legislative sovereignty exercised by the Imperial Parliament. In the supposed case the Dominion Parliament commands the judges to act in a particular manner, and the Imperial Parliament commands them to act in another manner. Of these two commands the order of the Imperial Parliament is the one which must be obeyed. This is the very meaning of Parliamentary sovereignty. Whenever, therefore, it is alleged that any enactment of the Dominion Parliament is repugnant to the provisions of any Act of the Imperial Parliament extending to the colony, the tribunal before which the objection is raised must pronounce upon the validity or constitutionality of the colonial law.<sup>2</sup>

Acts of  
colonial  
legislature  
may be pro-  
nounced  
void by  
courts.

The constitution of New Zealand is created by and

<sup>1</sup> See Tarring, *Law relating to the Colonies* (4th ed., 1913), pp. 209-221, for a list of imperial statutes which relate to the colonies in general, and which therefore no colonial legislation can, except under powers given by some Act of the Imperial Parliament, contravene. For the legislative competence of the Dominions, see Intro. pp. xlv *et seq.*, ci, *ante*.

<sup>2</sup> See *Powell v. Apollo Candle Co.* (1885) 10 App. Cas. 282; *Hodge v. The Queen* (1883) 9 App. Cas. 117; cf. Intro. pp. lv, lvi, *ante*.



Part I. depends upon the New Zealand Constitution Act, 1852, and the Acts amending the same. One might therefore expect that the Parliament of the Dominion of New Zealand, which may conveniently be called the New Zealand Parliament, would exhibit that "mark of subordination" which consists in the inability of a legislative body to change fundamental or constitutional laws, or (what is the same thing) in the clearly drawn distinction between ordinary laws which the legislature can change and laws of the constitution which it cannot change, at any rate when acting in its ordinary legislative character. But this anticipation is hardly borne out by an examination into the Acts creating the constitution of New Zealand. A comparison of the Colonial Laws Validity Act, 1865, s. 5, with the New Zealand Constitution Act, as subsequently amended, shows that the New Zealand Parliament can change the articles of the constitution. This power, derived from imperial statutes, is of course in no way inconsistent with the legal sovereignty of the Imperial Parliament.<sup>1</sup> One may fairly therefore assert that the New Zealand Parliament, in common with many other colonial legislative assemblies, is, though a "subordinate," at once a legislative and a constituent assembly. It is a "subordinate" assembly<sup>2</sup> because its powers are limited by the

<sup>1</sup> The constitutions of some self-governing States of the British Commonwealth, e.g. Victoria, certainly show that a Victorian law altering the constitution must in some instances be passed in a manner different from the mode in which other laws are passed. This is a faint recognition of the difference between fundamental and other laws. Compare 18 & 19 Vict. c. 55, Sched. I. s. 60; but there appears to have been considerable laxity in regard to observing these constitutional provisions. See Jenks, *Government of Victoria* (1891), pp. 247-249, and Intro. pp. liii *et seq.* *ante*.

<sup>2</sup> It is usually the case that a self-governing Dominion, such as New

Colonial  
Parlia-  
ment may  
be a "con-  
stituent"  
as well as  
legislative  
body.

legislation of the Imperial Parliament; it is a constituent assembly since it can change the articles of the constitution of New Zealand. The authority of the New Zealand Parliament to change the articles of the constitution of New Zealand is from several points of view worth notice.

We have here a decisive proof that there is no necessary connection between the written character and the immutability of a constitution. The New Zealand constitution is to be found in a written document; it is a statutory enactment. Yet the articles of this constitutional statute can be changed by the Parliament which it creates, and changed in the same manner as any other law.<sup>1</sup> This may seem an

Zealand, has the power in one form or another to change the Dominion constitution. The extent, however, of this power, and the mode in which it can be exercised, depends upon the terms of the Act of Parliament, or of the charter creating or amending the colonial constitution, and differs in different cases. Thus the Parliament of New Zealand can change almost all, though not quite all, of the articles of the constitution, and can change them in the same manner in which it can change an ordinary colonial law. The Parliament of the Canadian Dominion cannot change the constitution of the Dominion. The Parliament of the Australian Commonwealth, on the other hand, occupies a peculiar position. It can by virtue of the terms of the constitution itself alter, by way of ordinary legislation, certain of the articles of the constitution (see, e.g., Constitution of Commonwealth, ss. 65, 67), whilst it cannot, by way of ordinary legislation, change other articles of the constitution. All the articles, however, of the constitution which cannot be changed by ordinary Parliamentary legislation can—subject, of course, to the sanction of the Crown—be altered or abrogated by the Houses of the Parliament, and a vote of the people of the Commonwealth, as provided by the Constitution of the Commonwealth, s. 128. The point to be specially noted is, that the Imperial Parliament, as a rule, enables a self-governing Dominion to change its constitution. The exception in the case of Canada is more apparent than real; the Imperial Parliament would no doubt give effect to any change clearly desired by the inhabitants of the Dominion of Canada.

<sup>1</sup> For powers of constitutional amendment in New Zealand, see Wheare, *The Statute of Westminster and Dominion Status* (1938), pp. 227-229.

**Part I.** obvious matter enough, but writers of eminence so often use language which implies or suggests that the character of a law is changed by its being expressed in the form of a statute as to make it worth while noting that a statutory constitution need not be in any sense an immutable constitution. The readiness again with which the English Parliament has conceded constituent powers to colonial legislatures shows how little hold is exercised over Englishmen by that distinction between fundamental and non-fundamental laws which runs through almost all the constitutions not only of the Continent but also of America. The explanation appears to be that in England we have long been accustomed to consider Parliament as capable of changing one kind of law with as much ease as another. Hence when English statesmen gave Parliamentary government to the colonies, they almost as a matter of course bestowed upon colonial legislatures authority to deal with every law, whether constitutional or not, which affected the colony, subject of course to the proviso, rather implied than expressed, that this power should not be used in a way inconsistent with the supremacy of the British Parliament. The colonial legislatures, in short, are within their own sphere copies of the Imperial Parliament. They are within their own sphere sovereign bodies; but their freedom of action is controlled by their subordination to the Parliament of the United Kingdom.

The question may naturally be asked how the large amount of colonial liberty conceded to countries like New Zealand has been legally reconciled with Imperial sovereignty?

How conflicts between imperial and colonial legislation avoided.

The inquiry lies a little outside our subject, but is not really foreign to it, and well deserves an answer. Nor is the reply hard to find if we keep in mind the true nature of the difficulty which needs explanation.

The problem is not to determine what are the means by which the English Government keeps the colonies in subjection, or maintains the political sovereignty of the United Kingdom. This is a matter of politics with which this book has no concern.

The question to be answered is how (assuming the law to be obeyed throughout the whole of the British Empire) colonial legislative freedom is made compatible with the legislative sovereignty of Parliament? How are the Imperial Parliament and the colonial legislatures prevented from encroaching on each other's spheres?

No one will think this inquiry needless who remarks that in confederations, such as the United States, or the Canadian Dominion, the courts are constantly occupied in determining the boundaries which divide the legislative authority of the Central Government from that of the State Legislatures.

The assertion may sound paradoxical, but is nevertheless strictly true, that the acknowledged legal supremacy of Parliament is one main cause of the wide power of legislation allowed to colonial assemblies.

Conflicts averted by (i.) supremacy of British Parliament ;

The constitutions of the colonies depend directly or indirectly upon imperial statutes. No lawyer questions that Parliament could legally abolish any colonial constitution, or that Parliament can at any

Part I. moment legislate for the colonies and repeal or override any colonial law whatever. Parliament moreover does from time to time pass Acts affecting the colonies, and the colonial,<sup>1</sup> no less than the English, courts completely admit the principle that a statute of the Imperial Parliament binds any part of the British dominions to which the statute is meant to apply. But when once this is admitted, it becomes obvious that there is little necessity for defining or limiting the sphere of colonial legislation. If an Act of the New Zealand Parliament contravenes an imperial statute, it is for legal purposes void; and if an Act of the New Zealand Parliament, though not infringing upon any statute, is so opposed to the interests of the Empire that it ought not to be passed, the British Parliament may render the Act of no effect by means of an imperial statute.

(ii.) right  
of veto.

This course, however, is rarely, if ever, necessary; for Parliament exerts authority over colonial legislation by in effect regulating the use of the Crown's "veto" in regard to colonial Acts. This is a matter which itself needs a little explanation.

The Crown's right to refuse assent to bills which have passed through the Houses of Parliament is practically obsolete.<sup>2</sup> The power of the Crown to

<sup>1</sup> See Todd, *Parliamentary Government in the British Colonies* (2nd ed., 1894), ch. v.

<sup>2</sup> This statement has been questioned—see Hearn, *Government of England* (2nd ed., 1887), p. 63—but is, it is submitted, correct. The so-called "veto" has never been employed as regards any public bill since the accession of the House of Hanover. When George the Third wished to stop the passing of Fox's India Bill, he abstained from using the Crown's right to dissent from proposed legislation, but availed himself of his influence in the House of Lords to procure the rejection of the measure. No stronger proof could be given that the right of veto was more than a century ago already obsolete. But the statement that a power is practically obsolete does not involve the assertion that



negative or veto the bills of colonial legislatures stands on a different footing. It is virtually, though not in name, the right of the Imperial Parliament to limit colonial legislative independence, and is frequently exercised.

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This check on colonial legislation is exerted in two different manners.<sup>1</sup>

The Governor of a colony, say New Zealand, may directly refuse his assent to a bill, passed by both

How right  
of "veto"  
exercised.

it could under no conceivable circumstances be revived. On the whole subject of the veto, and the different senses in which the expression is used, the reader should consult an excellent article by Professor Orelli of Zurich, to be found under the word "Veto" in *Encyclopædia Britannica* (9th ed., 1888), vol. xxiv, p. 206.

The history of the Royal Veto curiously illustrates the advantage which sometimes arises from keeping alive in theory prerogatives which may seem to be practically obsolete. The Crown's legislative "veto" has certainly long been unused in England, but it has turned out a convenient method of regulating the relations between the United Kingdom and the Colonies. If the right of the King to refuse his assent to a bill which had passed the two Houses of Parliament had been abolished by statute, it would have been difficult, if not impossible, for the King to veto, or disallow, Acts passed by a legislature of a Crown Colony. It would, in other words, have been hard to create a parliamentary veto of colonial legislation.

<sup>1</sup> The mode in which power to veto colonial legislation is exercised may be best understood from the following extract from the *Rules and Regulations for Her Majesty's Colonial Service* (Colonial Office, 1867), ch. iii, pp. 13, 14:—

#### § 1. Legislative Councils and Assemblies

48. In every Colony the Governor has authority, either to give or to withhold his assent to Laws passed by the other branches or members of the Legislature, and until that assent is given no such Law is valid or binding.

49. Laws are in some cases passed with Suspending Clauses; that is, although assented to by the Governor they do not come into operation or take effect in the Colony until they shall have been specially confirmed by Her Majesty, and in other cases Parliament has for the same purpose empowered the Governor to reserve laws for the Crown's assent, instead of himself assenting or refusing his assent to them.

50. Every Law which has received the Governor's assent (unless it contains a Suspending Clause) comes into operation immediately, or at the time specified in the Law itself. But the Crown retains power to disallow the Law; and if such power be exercised... the Law ceases to have operation from the date at which such disallowance is published in the Colony.

51. In Colonies having Representative Assemblies the disallowance of any Law, or the Crown's assent to a Reserved Bill, is signified by Order in Council. The confirmation of an Act passed with a Suspending Clause, is not signified by Order in

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Houses of the New Zealand Parliament. In this case the bill is finally lost, just as would be a bill which had been rejected by the colonial council, or as would be a bill passed by the English Houses of Parliament if the Crown were to exert the obsolete prerogative of refusing the royal assent. The Governor, again, may, without refusing his assent, reserve the bill for the consideration of the Crown. In such case the bill does not come into force until it has received the royal assent, which is in effect the assent of the English Ministry, and therefore indirectly of the Imperial Parliament.

The Governor, on the other hand, may, as representing the Crown, give his assent to a New Zealand bill. The bill thereupon comes into force throughout New Zealand. But such a bill, though for a time a valid Act, is not finally made law even in New Zealand, since the Crown may, after the Governor's assent has been given, disallow the colonial Act. The case is thus put by Mr. Todd: "Although a governor as repre-

Council unless this mode of confirmation is required by the terms of the Suspending Clause itself, or by some special provision in the Constitution of the Colony.

52. In Crown Colonies the allowance or disallowance of any Law is generally signified by despatch.

53. In some cases a period is limited, after the expiration of which Local Enactments, though not actually disallowed, cease to have the authority of Law in the Colony, unless before the lapse of that time Her Majesty's confirmation of them shall have been signified there; but the general rule is otherwise.

54. In Colonies possessing Representative Assemblies, Laws purport to be made by the Queen or by the Governor on Her Majesty's behalf or sometimes by the Governor alone, omitting any express reference to Her Majesty, with the advice and consent of the Council and Assembly. They are almost invariably designated as Acts. In Colonies not having such Assemblies, Laws are designated as Ordinances, and purport to be made by the Governor, with the advice and consent of the Legislative Council (or in British Guiana of the Court of Policy).

The "veto," it will be perceived, may be exercised by one of two essentially different methods: first, by the refusal of the Governor's assent; secondly, by the exercise of the royal power to disallow laws, even when assented to by the Governor. As further the Governor may reserve bills for the royal consideration, and as colonial laws are sometimes passed containing a clause which suspends their operation until the signification of the royal assent, the check on colonial legislation may be exercised in four different forms—

"senting the Crown is empowered to give the royal  
 "assent to bills, this act is not final and conclusive ;  
 "the Crown itself having, in point of fact, a second  
 "veto. All statutes assented to by the governor of  
 "a colony go into force immediately, unless they  
 "contain a clause suspending their operation until the  
 "issue of a proclamation of approval by the queen  
 "in council, or some other specific provision to the  
 "contrary ; but the governor is required to trans-  
 "mit a copy thereof to the secretary of state for the  
 "colonies ; and the queen in council may, within  
 "two years after the receipt of the same, disallow  
 "any such Act."<sup>1</sup>

- (1) The refusal of the Governor's assent to a bill.
- (2) Reservation of a bill for the consideration of the Crown, and the subsequent lapse of the bill owing to the royal assent being refused, or not being given within the statutory time.
- (3) The insertion in a bill of a clause preventing it from coming into operation until the signification of the royal assent thereto, and the want of such royal assent.
- (4) The disallowance by the Crown of a law passed by the Colonial Parliament with the assent of the Governor.

The reader should note, however, the essential difference between the three first modes and the fourth mode of checking colonial legislation. Under the three first a proposed law passed by the colonial legislature never comes into operation in the colony. Under the fourth a colonial law which has come into operation in the colony is annulled or disallowed by the Crown from the date of such disallowance. In the case of more than one colony, such disallowance must, under the Constitution, be signified within two years. See the British North America Act, 1867, s. 56. Compare the Australian Constitutions Act, 1842, ss. 32, 33 ; the Australian Constitutions Act, 1850, and the Victoria Constitution Act, 1855, s. 3. In the case of the Dominions the exercise of the powers of reservation and disallowance have long since been allowed to lapse.

Under the Australian Commonwealth Act the King may disallow an Act assented to by the Governor-General within one year after the Governor-General's assent. (Commonwealth of Australia Constitution, 1900, Act, s. 59).

<sup>1</sup> Todd, *Parliamentary Government in the British Colonies* (2nd ed., 1894), p. 171. See Conference on Operation of Dominion Legislation, 1929 (Cmd. 3479, 1930), pp. 11-17. The Governor-General of Canada on the advice of the Dominion Cabinet disallowed certain Acts of the Legislature of Alberta in 1938.

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The result therefore of this state of things is, that colonial legislation is subject to a real veto on the part of the imperial government, and no bill which the English Ministry think ought for the sake of imperial interests to be negatived can, though passed by the New Zealand or other colonial legislature, come finally into force. The home government is certain to negative or disallow any colonial law which, either in letter or in spirit, is repugnant to Parliamentary legislation, and a large number of Acts can be given which on one ground or another have been either not assented to or disallowed by the Crown. In 1868 the Crown refused assent to a Canadian Act reducing the salary of the Governor-General.<sup>1</sup> In 1872 the Crown refused assent to a Canadian Copyright Act because certain parts of it conflicted with imperial legislation. In 1873 a Canadian Act was disallowed as being contrary to the express terms of the British North America Act, 1868; and on similar grounds in 1878 a Canadian Shipping Act was disallowed.<sup>2</sup> So again the Crown has at times in effect passed a veto upon Australian Acts for checking Chinese immigration.<sup>3</sup> And Acts passed by a colonial legislature, allowing divorce on the ground solely of the husband's adultery or (before the passing of the Deceased Wife's Sister's Marriage Act, 1907) legalising marriage with a deceased wife's sister or with a deceased husband's brother, have (though not consistently with the general tenor of our colonial policy)

<sup>1</sup> Todd, *op. cit.*, pp. 177, 178.

<sup>2</sup> *Ibid.*, pp. 180, 183.

<sup>3</sup> As regards the Australian Colonies prior to 1900 such legislation had, the author was informed, been checked in the following manner. Immigration Bills were reserved by the Governors for the consideration of the Crown, and if the assent of the Crown were not given, the Bills never came into force.

been sometimes disallowed by the Crown, that is, in effect by the home government. Chapter II.

The general answer therefore to the inquiry, how colonial liberty of legislation is made legally reconcilable with imperial sovereignty, is that the complete recognition of the supremacy of Parliament obviates the necessity for carefully limiting the authority of colonial legislatures, and that the home government, who in effect represent Parliament, retain by the use of the Crown's veto the power of preventing the occurrence of conflicts between colonial and imperial laws. To this it must be added that imperial treaties legally bind the colonies, and that the "treaty-making power," to use an American expression, resides in the Crown, and is therefore exercised by the home government in accordance with the wishes of the Houses of Parliament, or more strictly of the House of Commons; whilst the authority to make treaties is, except where expressly allowed by Act of Parliament, not possessed by any colonial government.<sup>1</sup>

It should, however, be observed that the legislature of a self-governing colony is free to determine whether or not to pass laws necessary for giving effect to a treaty entered into between the imperial government and a foreign power; and further, that there might in practice be great difficulty in enforcing within the limits of a colony the terms of a treaty, *e.g.* as to the extradition of criminals, to which colonial sentiment was opposed. But this does not affect the principle of law that a colony is bound by treaties made by the imperial government, and does not, unless under some special provision of an Act of

<sup>1</sup> See Todd, *op. cit.*, pp. 268 *et seq.*



**Part I.** Parliament, possess authority to make treaties with any foreign power.

Policy of imperial government not to interfere with action of colonies.

Any one who wishes justly to appreciate the nature and the extent of the control exerted by Great Britain over colonial legislation should keep two points carefully in mind. The tendency, in the first place, of the imperial government is as a matter of policy to interfere less and less with the action of the colonies, whether in the way of law-making<sup>1</sup> or otherwise.<sup>2</sup> Colonial Acts, in the second place, even when finally assented to by the Crown, are, as already pointed out, invalid if repugnant to an Act of Parliament applying to the colony. The imperial policy therefore of non-intervention in the local affairs of

<sup>1</sup> Thus the New Zealand Deceased Husband's Brother Marriage Act, 1900, legalising marriage with a deceased husband's brother, the Immigration Restriction Act, 1901, passed by the Commonwealth Parliament, the Immigrant Restriction Act, 1907, passed by the Transvaal Legislature, all received the sanction of the Crown. The last enactment illustrated the immensely wide legislative authority which the home government would under some circumstances concede to a colonial Parliament. The Secretary of State for India (Mr. John Morley) "regrets that he cannot agree that the Act in question can be regarded as similar to the legislation already sanctioned in other self-governing Colonies. . . . Section 2 (4) of the Transvaal Act introduces a principle to which no parallel can be found in previous legislation. This clause . . . will debar from entry into the Transvaal British subjects who would be free to enter into any other Colony by proving themselves capable of passing the educational tests laid down for immigrants. It will, for instance, permanently exclude from the Transvaal members of learned professions and graduates of European Universities of Asiatic origin who may in future wish to enter the Colony." See *Correspondence relating to Legislation affecting Asiatics in the Transvaal* (1908, Cd. 3887), pp. 52, 53, and cf. pp. 31, 32.

<sup>2</sup> Except in the case of political treaties, such as the Hague Conventions, the Government of the United Kingdom did not even in 1914 bind the Dominions by treaties, but secures the insertion in treaties of clauses allowing colonies to adhere to a treaty if they desire to do so.

British dependencies combines with the supreme legislative authority of the Imperial Parliament to render encroachments by the Parliament of the United Kingdom on the sphere of colonial legislation, or by colonial Parliaments on the domain of imperial legislation, of comparatively rare occurrence.<sup>1</sup>

Chapter  
II.

## II. *Foreign Non-sovereign Legislatures.*

We perceive without difficulty that the Parliaments of even those colonies, such as the Dominion of Canada, or the Australian Commonwealth, which are most nearly independent states, are not in reality sovereign legislatures. This is easily seen, because the sovereign Parliament of the United Kingdom, which legislates for the whole British Empire, is visible in the background, and because the colonies, however large their practical freedom of action, do not act as independent powers in relation to foreign states; the Parliament of a dependency cannot itself be a sovereign body. It is harder for Englishmen to realise that the legislative assembly of an independent nation may not be a sovereign assembly. Our political habits of thought indeed are so based upon the assumption of Parliamentary omnipotence, that the position of a Parliament which represents an independent nation and yet is not itself a sovereign power is apt to appear to us exceptional or anomalous. Yet whoever examines the constitutions of civilised

Non-sovereign legislatures of independent nations.

<sup>1</sup> The right of appeal to the Privy Council from the decision of the courts of the Dominions was, in the author's opinion, another link strengthening the connection between the Dominions and England.

There were, prior to 1914, a good number of conflicts between imperial and local legislation as to matters affecting merchant shipping.

Part I. countries will find that the legislative assemblies of great nations are, or have been, in many cases legislative without being constituent bodies. To determine in any given case whether a foreign legislature be a sovereign power or not we must examine the constitution of the state to which it belongs, and ascertain whether the legislature whose position is in question bears any of the marks of subordination. Such an investigation will in many or in most instances show that an apparently sovereign assembly is in reality a non-sovereign law-making body.

France. France has within the last hundred and thirty years made trial of at least twelve constitutions.<sup>1</sup>

These various forms of government have, amidst all their differences, possessed in general one common feature. They have most of them been based upon the recognition of an essential distinction between constitutional or "fundamental" laws intended to be either immutable or changeable only with great difficulty, and "ordinary" laws which could be changed by the ordinary legislature in the common course of legislation. Hence under the constitutions which France has from time to time adopted the common Parliament or legislative body has not been a sovereign legislature.

Constitutional  
monarchy  
of Louis  
Philippe.

The constitutional monarchy of Louis Philippe, in outward appearance at least, was modelled on the constitutional monarchy of England. In the Charter not a word could be found which expressly limits the legislative authority possessed by the Crown and the two Chambers, and to an Englishman it

<sup>1</sup> Demombynes, *Les Constitutions européennes* (2nd ed., 1883), vol. ii, pp. 1-5.

would seem certainly arguable that under the Orleans dynasty the Parliament was possessed of sovereignty. This, however, was not the view accepted among French lawyers. The "immutability of the constitution of France," writes de Tocqueville, "is a necessary consequence of the laws of that country. . . . As the King, the Peers, and the Deputies all derive their authority from the constitution, these three powers united cannot alter a law by virtue of which alone they govern. Out of the pale of the constitution they are nothing; where, then, could they take their stand to effect a change in its provisions? The alternative is clear: either their efforts are powerless against the Charter, which continues to exist in spite of them, in which case they only reign in the name of the Charter; or they succeed in changing the Charter, and then the law by which they existed being annulled, they themselves cease to exist. By destroying the Charter, they destroy themselves. This is much more evident in the laws of 1830 than in those of 1814. In 1814 the royal prerogative took its stand above and beyond the constitution; but in 1830 it was avowedly created by, and dependent on, the constitution. A part, therefore, of the French constitution is immutable, because it is united to the destiny of a family; and the body of the constitution is equally immutable, because there appear to be no legal means of changing it. These remarks are not applicable to England. That country having no written constitution, who can assert when its constitution is changed?"<sup>1</sup>

<sup>1</sup> de Tocqueville, *Democracy in America* (translation by H. Reeve, 1875), vol. ii, App. pp. 322, 323. (*Œuvres complètes* (14th ed., 1864), vol. i (Démocratie en Amérique), p. 311.

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de Tocqueville's reasoning<sup>1</sup> may not carry conviction to an Englishman, but the weakness of his argument is of itself strong evidence of the influence of the hold on French opinion of the doctrine which it is intended to support, namely, that Parliamentary sovereignty was not a recognised part of French constitutionalism. The dogma which is so naturally assented to by Englishmen contradicts that idea of the essential difference between constitutional and other laws which appears to have a firm hold on most foreign statesmen and legislators.

Republic  
of 1848.

The Republic of 1848 expressly recognised this distinction; no single article of the constitution proclaimed on 4th November 1848 could be changed in the same way as an ordinary law. The legislative assembly sat for three years. In the last year of its existence, and then only, it could by a majority of three-fourths, and not otherwise, convoke a constituent body with authority to modify the constitution. This constituent and sovereign assembly differed in numbers, and otherwise, from the ordinary non-sovereign legislature.

Present  
Republic.

The National Assembly of the French Republic exerts at least as much direct authority as the English Houses of Parliament. The French Chamber of Deputies exercises at least as much influence on the appointment of Ministers, and controls the action of the government, at least as strictly as does our House

<sup>1</sup> His view was certainly paradoxical. (See Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 149, pp. 1090-1098. As a matter of fact one provision of the Charter, namely, art. 23, regulating the appointment of Peers, was changed by the ordinary process of legislation. See Law of 29th December, 1831, Hélie, *Les Constitutions de la France* (1879), ch. vi. p. 1006 (Loi du 29 Decembre, 1831).



of Commons. The President, moreover, does not possess even a theoretical right of veto. For all this, however, the French Parliament is not a sovereign assembly, but is bound by the laws of the constitution in a way in which no law binds our Parliament. The articles of the constitution, or "fundamental laws," stand in a totally different position from the ordinary law of the land. Under article 8 of the constitution, no one of these fundamental enactments can be legally changed otherwise than subject to the following provisions:—

"8. *Les Chambres auront le droit, par délibérations séparées, prises dans chacune à la majorité absolue des voix, soit spontanément, soit sur la demande du Président de la République, de déclarer qu'il y a lieu de réviser les lois constitutionnelles. Après que chacune des deux Chambres aura pris cette résolution, elles se réuniront en Assemblée nationale pour procéder à la révision.—Les délibérations portant révision des lois constitutionnelles, en tout ou en partie, devront être prises à la majorité absolue des membres composant l'Assemblée nationale.*"<sup>1</sup>

<sup>1</sup> Duguit et Monnier, *Les Constitutions et les principales lois politiques de la France depuis 1789* (1898), Loi du 25 Fév. 1875, art. viii, p. 320. A striking example of the difference between English and French constitutionalism is to be found in the division of opinion which exists between French writers of authority on the answer to the inquiry whether the French Chambers, when sitting together, have constitutionally the right to change the constitution. To an Englishman the question seems hardly to admit of discussion, for Art. 8 of the constitutional laws enacts in so many words that these laws may be revised, in the manner therein set forth, by the Chambers when sitting together as a National Assembly. Many French constitutionalists therefore lay down, as would any English lawyer, that the Assembly is a constituent as well as a legislative body, and is endowed with the right to change the constitution (Duguit, *Manuel de Droit Public français; Droit Con-*

## Part I.

Supreme legislative power is therefore under the Republic vested not in the ordinary Parliament of two Chambers, but in a "national assembly," or congress, composed of the Chamber of Deputies and the Senate sitting together.

Distinction  
between  
flexible  
and rigid  
constitu-  
tions.

The various constitutions, in short, of France, which are in this respect fair types of continental politics,<sup>1</sup> exhibit, as compared with the expansiveness or "flexibility" of English institutions, that characteristic which may be conveniently described as "rigidity."

And here it is worth while, with a view to understanding the constitution of our own country, to make perfectly clear to ourselves the distinction already referred to between a "flexible" and a "rigid" constitution.

*stitutionnel* (1907), para. 151, pp. 1100-1107; Moreau, *Précis élémentaire de Droit Constitutionnel* (10th ed., 1928), pp. 395-413). But some eminent authorities maintain that this view is erroneous, and that in spite of the words of the constitution the ultimate right of constitutional amendment must be exercised directly by the French people, and that therefore any alteration in the constitutional laws by the Assembly lacks, at any rate, moral validity unless it is ratified by the direct vote of the electors. (See, on the one side, Duguit, *op. cit.*, para. 151; Bard et Robiquet, *La Constitution française de 1875* (2nd ed., 1878), pp. 374-390, and on the other side, Esmein, *Éléments de Droit constitutionnel français et comparé* (7th ed., 1921), vol. ii, ch. vii, pp. 495-511; Borgeaud, *Etablissement et révision des Constitutions en Amérique et en Europe* (1893), part iii, bk. ii, ch. viii, pp. 303-307).

<sup>1</sup> No constitution better merits study in this as in other respects than the constitution of Belgium. Though formed after the English model, it rejects or omits the principle of Parliamentary sovereignty. The ordinary Parliament cannot change anything in the constitution; it is a legislative, not a constituent body; it can declare that there is reason for changing a particular constitutional provision, and having done so is *ipso facto* dissolved (*après cette déclaration les deux chambres sont dissoutes de plein droit*). The new Parliament thereupon elected has a right to change the constitutional article which has been declared subject to change (*Constitution de La Belgique*, arts. 131, 71).

A "flexible" constitution is one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. The "flexibility" of our constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London. With us, laws therefore are called constitutional, because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws. And as a matter of fact, the meaning of the word "constitutional" is in England so vague that the term "a constitutional law or enactment" is rarely applied to any English statute as giving a definite description of its character.

Chapter  
II.Flexible  
constitu-  
tions.

A "rigid" constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. The "rigidity" of the constitution, say of Belgium or of France, consists in the absence of any right on the part of the Belgian or French Parliament, when acting in its ordinary capacity, to modify or repeal certain definite laws termed constitutional or fundamental. Under a rigid constitution the term "constitutional" as applied to a law has a perfectly definite sense. It means that a particular enactment belongs to the articles of the constitution, and cannot be legally changed with the same ease and in the same manner as ordinary laws. The articles of

Rigid con-  
stitutions.

## Part I.

the constitution will no doubt generally, though by no means invariably, be found to include all the most important and fundamental laws of the state. But it certainly cannot be asserted that where a constitution is rigid all its articles refer to matters of supreme importance. The rule that the French Parliament must meet at Versailles was at one time one of the constitutional laws of the French Republic. Such an enactment, however practically important, would never in virtue of its own character have been termed constitutional; it was constitutional simply because it was included in the articles of the constitution.<sup>1</sup>

The contrast between the flexibility of the English and the rigidity of almost every foreign constitution suggests two interesting inquiries.

*First*, Does the rigidity of a constitution secure its permanence and invest the fundamental institutions of the state with practical immutability?

To this inquiry historical experience gives an indecisive answer.

In some instances the fact that certain laws or institutions of a state have been marked off as placed beyond the sphere of political controversy, has, apparently, prevented that process of gradual innovation

<sup>1</sup> The terms "flexible" and "rigid" (originally suggested by the author's friend, Lord Bryce) are used throughout this work without any connotation either of praise or of blame. The flexibility and expansiveness of the English constitution, or the rigidity and immutability of, *e.g.*, the constitution of the United States, may each be qualities which according to the judgment of different critics deserve either admiration or censure. With such judgments this treatise has no concern. The author's whole aim was to make clear the exact difference between a flexible and a rigid constitution. It was not his object to pronounce any opinion on the question whether the flexibility or rigidity of a given polity be a merit or a defect.

which in England has, within not much more than sixty years, transformed our polity. The constitution of Belgium stood for more than half a century without undergoing, in form at least, any material change whatever. The constitution of the United States has lasted for more than a hundred years, but has not undergone anything like the amount of change which has been experienced by the constitution of England since the death of George the Third.<sup>1</sup> But if the inflexibility of constitutional laws has in certain instances checked the gradual and unconscious process of innovation by which the foundations of a commonwealth are undermined, the rigidity of constitutional forms has in other cases provoked revolution. The twelve unchangeable constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence. Louis Philippe's monarchy was destroyed within seven years of the time when de Tocqueville pointed out that no power existed legally capable of altering the articles of the Charter. In one notorious instance at least—and other examples of the same phenomenon might be produced from the annals of revolutionary France—the immutability of the constitution was the ground or excuse for its violent subversion. The best plea for the *Coup d'état* of 1851 was, that while the French people wished for the re-election of the President, the article of the constitution requiring a majority of three-fourths of

<sup>1</sup> No doubt the constitution of the United States had in reality, though not in form, changed a good deal since the beginning of last century; but the change had been effected far less by formally enacted constitutional amendments than by the growth of customs or institutions which have modified the working without altering the articles of the constitution. See Horwill, *The Usages of the American Constitution* (1925).



Part I. the legislative assembly in order to alter the law which made the President's re-election impossible, thwarted the will of the sovereign people. Had the Republican Assembly been a sovereign Parliament, Louis Napoleon would have lacked the plea, which seemed to justify, as well as some of the motives which tempted him to commit, the crime of the 2nd of December.

Nor ought the perils in which France was involved by the immutability with which the statesmen of 1848 invested the constitution to be looked upon as exceptional; they arose from a defect which is inherent in every rigid constitution. The endeavour to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power; it therefore tends to bring the letter of the law into conflict with the will of the really supreme power in the state. The majority of French electors were under the constitution the true sovereign of France; but the rule which prevented the legal re-election of the President in effect brought the law of the land into conflict with the will of the majority of the electors, and produced, therefore, as a rigid constitution has a natural tendency to produce, an opposition between the letter of the law and the wishes of the sovereign. If the inflexibility of French constitutions has provoked revolution, the flexibility of English institutions has, once at least, saved them from violent overthrow. To a student, who at this distance of time calmly studies the history of the first Reform Bill, it is apparent, that in 1832 the supreme legislative authority of Parliament enabled the nation to carry through a political revolution under the guise of a legal reform.

The rigidity, in short, of a constitution tends to check gradual innovation ; but, just because it impedes change, may, under unfavourable circumstances, occasion or provoke revolution.

*Secondly*, What are the safeguards which under a rigid constitution can be taken against unconstitutional legislation ?

The general answer to our inquiry (which of course can have no application to a country like England, ruled by a sovereign Parliament) is that two methods may be, and have been, adopted by the makers of constitutions, with a view to rendering unconstitutional legislation, either impossible, or inoperative.

Reliance may be placed upon the force of public opinion and upon the ingenious balancing of political powers for restraining the legislature from passing unconstitutional enactments. This system opposes unconstitutional legislation by means of moral sanctions, which resolve themselves into the influence of public sentiment.

Authority, again, may be given to some person or body of persons, and preferably to the courts, to adjudicate upon the constitutionality of legislative acts, and treat them as void if they are inconsistent with the letter or the spirit of the constitution. This system attempts not so much to prevent unconstitutional legislation as to render it harmless through the intervention of the tribunals, and rests at bottom on the authority of the judges.

This general account of the two methods by which it may be attempted to secure the rigidity of a constitution is hardly intelligible without further

Chapter  
II.

What are the safeguards against unconstitutional legislation ?

Part I. illustration. Its meaning may be best understood by a comparison between the different policies in regard to the legislature pursued by two different classes of constitutionalists.

Safeguards  
provided  
by conti-  
nental  
constitu-  
tionalists.

French constitution-makers and their continental followers have, as we have seen, always attached vital importance to the distinction between fundamental and other laws, and therefore have constantly created legislative assemblies which possessed "legislative" without possessing "constituent" powers. French statesmen have therefore been forced to devise means for keeping the ordinary legislature within its appropriate sphere. Their mode of procedure has been marked by a certain uniformity; they have declared on the face of the constitution the exact limits imposed upon the authority of the legislature; they have laid down as articles of the constitution whole bodies of maxims intended to guide and control the course of legislation; they have provided for the creation, by special methods and under special conditions, of a constituent body which alone should be entitled to revise the constitution. They have, in short, directed their attention to restraining the ordinary legislature from attempting any inroad upon the fundamental laws of the state; but they have in general trusted to public sentiment,<sup>1</sup> or at any rate to political con-

<sup>1</sup> "Aucun des pouvoirs institués par la constitution n'a le droit de la changer dans son ensemble ni dans ses parties, sauf les réformes qui pourront y être faites par la voie de la révision, conformément aux dispositions du titre VII. ci-dessus.

"L'Assemblée nationale constituante en remet le dépôt à la fidélité du Corps législatif, du Roi et des juges, à la vigilance des pères de famille, aux épouses et aux mères, à l'affection des jeunes citoyens, au courage de tous les Français."—Constitution de 1791,

siderations, for inducing the legislature to respect the restraints imposed on its authority, and have usually omitted to provide machinery for annulling unconstitutional enactments, or for rendering them of no effect.

These traits of French constitutionalism are specially noticeable in the three earliest of French political experiments. The Monarchical constitution of 1791, the Democratic constitution of 1793, the Directorial constitution of 1795 exhibit, under all their diversities, two features in common. They each, on the one hand, confine the power of the legislature within very narrow limits indeed; under the Directory, for instance, the legislative body could not itself change any one of the 377 articles of the constitution, and the provisions for creating a constituent assembly were so framed that not the very least alteration in any of these articles could have been carried out within a period of less than nine years.<sup>1</sup> None of these constitutions, on the other hand,

French  
Revolu-  
tionary  
constitu-  
tions.

Tit. vii, Art. 8; Duguit et Monnier, *Les Constitutions et les principales lois politiques de la France depuis 1789* (1898), Constitution du 3 Sept. 1791, p. 34.

These are the terms in which the National Assembly entrusts the Constitution of 1791 to the guardianship of the nation. It is just possible, though not likely, that the reference to the judges is intended to contain a hint that the courts should annul or treat as void unconstitutional laws. Under the Constitution of the Year VIII. the senate had authority to annul unconstitutional laws. But this was rather a veto on what in England we should call Bills than a power to make void laws duly enacted. See Constitution of Year VIII., Tit. ii. Arts. 26, 28, Hélié, *Les Constitutions de la France* (1879), ch. iv, p. 579 (Constitution du 22 Frimaire, An viii, Tit. 2, arts. 26-28).

<sup>1</sup> See Constitution of 1795, Tit. xiii. Art. 338, Hélié, *Les Constitutions de la France* (1879), ch. iv, p. 463 (Constitution du 5 Fructidor, An iii. art. 338).

Part I. contain a hint as to the mode in which a law is to be treated which is alleged to violate the constitution. Their framers indeed hardly seem to have recognised the fact that enactments of the legislature might, without being in so many words opposed to the constitution, yet be of dubious constitutionality, and that some means would be needed for determining whether a given law was or was not in opposition to the principles of the constitution.

Existing  
Republican  
constitution.

These characteristics of the revolutionary constitutions have been repeated in the works of later French constitutionalists. Under the present French Republic there exist a certain number of laws (not it is true a very large number), which the Parliament cannot change; and what is perhaps of more consequence, the so-called Congress<sup>1</sup> could at any time increase the number of fundamental laws, and thereby greatly decrease the authority of future Parliaments. The constitution, however, contains no article providing against the possibility of an ordinary Parliament carrying through legislation greatly in excess of its constitutional powers. Any one in fact who bears in mind the respect paid in France from the time of the Revolution onwards to the legislation of *de facto* governments and the traditions of the French judicature, will assume with confidence that an enactment passed through the Chambers, promulgated by the President, and published in the *Bulletin des Lois*, will

<sup>1</sup> The proper title for a so-called Congress is *L'Assemblée Nationale*. The Assembly consists of the members of each chamber (Deputies and Senators) sitting as one body at Versailles. Each chamber must previously have declared separately for revision and the subject for revision must be specified.—Ed.



be held valid by every tribunal throughout the Republic.<sup>1</sup>

Chapter  
II.

Are the  
articles of  
continental  
constitu-  
tions  
"laws" ?

This curious result therefore ensues. The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion. What is true of the constitution of France applies with more or less force to other polities which have been formed under the influence of French ideas. The Belgian constitution, for example, restricts the action of the Parliament no less than does the Republican constitution of France. But it is at least doubtful whether Belgian constitutionalists have provided any means whatever for invalidating laws which diminish or do away with the rights (*e.g.* the right of freedom of speech) "guaranteed" to Belgian citizens. The jurists of Belgium maintain, in theory at least, that an Act of Parliament opposed to any article of the constitution ought to be treated by the courts as void. But during the whole period of Belgian independence, no tribunal, it is said, has ever pronounced judgment upon the constitutionality of an Act of Parliament. This shows, it may be said, that the Parliament has respected the constitution, and certainly affords some evidence that, under favourable circumstances, formal declarations of rights may, from their influence on

<sup>1</sup> For a short account in English of the present constitution of France, see Morrison, *The French Constitution* (1930).—Ed.

Part I. popular feeling, possess greater weight than is generally attributed to them in England; but it also suggests the notion that in Belgium, as in France, the restrictions on Parliamentary authority are supported mainly by moral or political sentiment, and are at bottom rather constitutional understandings than laws.

To an English critic, indeed, the attitude of continental and especially of revolutionary statesmen towards the ordinary legislature bears an air of paradox. They seem to be almost equally afraid of leaving the authority of the ordinary legislature unfettered, and of taking the steps by which the legislature may be prevented from breaking through the bonds imposed upon its power. The explanation of this apparent inconsistency is to be found in two sentiments which have influenced French constitution-makers from the very outbreak of the Revolution—an over-estimate of the effect to be produced by general declarations of rights, and a settled jealousy of any intervention by the judges in the sphere of politics.<sup>1</sup> We shall see, in a later chapter, that the public law of France is still radically influenced by the belief, even now almost universal among Frenchmen, that the law courts must not be allowed to interfere in any way whatever with matters of state, or indeed with anything affecting the machinery of government.<sup>2</sup>

Safeguards  
provided  
by found-  
ers of  
United  
States.

The authors of the American constitution have, for reasons that will appear in my next chapter, been even more anxious than French statesmen to limit

<sup>1</sup> de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. i (*Démocratie en Amérique*), pp. 167, 168.

<sup>2</sup> See ch. xii, *post*.

the authority of every legislative body throughout the Republic. They have further shared the faith of continental politicians in the value possessed by general declarations of rights. But they have, unlike French constitution-makers, directed their attention, not so much to preventing Congress and other legislatures from making laws in excess of their powers, as to the invention of means by which the effect of unconstitutional laws may be nullified; and this result they have achieved by making it the duty of every judge throughout the Union to treat as void any enactment which violates the constitution, and thus have given to the restrictions contained in the constitution on the legislative authority either of Congress or the State legislatures the character of real laws, that is, of rules enforced by the courts. This system, which makes the judges the guardians of the constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.

## CHAPTER III

### PARLIAMENTARY SOVEREIGNTY AND FEDERALISM

#### Part I.

#### Subject.

My present aim is to illustrate the nature of Parliamentary sovereignty as it exists in England, by a comparison with the system of government known as Federalism as it exists in several parts of the civilised world, and especially in the United States of America.<sup>1</sup>

Federalism  
best under-  
stood by  
studying  
constitu-  
tion of  
United  
States.

There are indeed to be found at the present time three other noteworthy examples of federal government -the Swiss Confederation, the Dominion of Canada, and the German Empire.<sup>2</sup> But while from a study of the institutions of each of these states one may draw illustrations which throw light on our subject, it will be best to keep our attention throughout this chapter fixed mainly on the institutions of the great American Republic. And this for two reasons. The Union, in the first place, presents the most completely developed type of federalism.

<sup>1</sup> On the whole subject of American Federalism, the reader should consult Bryce, *American Commonwealth* (1910 ed.), and with a view to matters treated of in this chapter should read with special care vol. i, pt. i; see also Amos, *The American Constitution* (1938), which contains a short account by a well-known English lawyer.

<sup>2</sup> To these we must add the Commonwealth of Australia (1900), and the proposed Federation of British India and the Native States. Germany has ceased to bear any of the characteristics of a Federal State.—ED.

All the features which mark that scheme of government, and above all the control of the legislature by the courts, are there exhibited in their most salient and perfect form; the Swiss Confederation,<sup>1</sup> moreover, and the Dominion of Canada, are more or less copied from the American model, whilst the constitution of the German Empire is too full of anomalies, springing both from historical and from temporary causes, to be taken as a fair representative of any known form of government. The constitution of the United States, in the second place, holds a very peculiar relation towards the institutions of England. In the principle of the distribution of powers which determines its form, the constitution of the United States is the exact opposite of the English constitution, the very essence of which is, as I hope I have now made clear, the unlimited authority of Parliament. But while the formal differences between the constitution of the American Republic and the constitution of the English monarchy are, looked at from one point of view, immense, the institutions of America are in their spirit little else than a gigantic development of the ideas which lie at the basis of the political and legal institutions of England. The principle, in short, which gives its form to our system of government is (to use a foreign but convenient expression) "unitarianism," or the habitual exercise of supreme legis-

<sup>1</sup> The essential feature of the Swiss Commonwealth is that it is a genuine and natural democracy, but a democracy based on Continental, and not on Anglo-Saxon, ideas of freedom and of government.

The constitution of the Commonwealth of Australia contains at least one feature apparently suggested by Swiss federalism, namely, the referendum or general vote of the electorate on amendments of the constitution.



**Part I.** lative authority by one central power, which in the particular case is the British Parliament. The principle which, on the other hand, shapes every part of the American polity, is that distribution of limited, executive, legislative, and judicial authority among bodies each co-ordinate with and independent of the other which, we shall in a moment see, is essential to the federal form of government. The contrast therefore between the two polities is seen in its most salient form, and the results of this difference are made all the more visible because in every other respect the institutions of the English people on each side the Atlantic rest upon the same notions of law, of justice, and of the relation between the rights of individuals and the rights of the government, or the state.

We shall best understand the nature of federalism and the points in which a federal constitution stands in contrast with the Parliamentary constitution of England if we note, first, the conditions essential to the existence of a federal state and the aim with which such a state is formed; secondly, the essential features of a federal union; and lastly, certain characteristics of federalism which result from its very nature, and form points of comparison, or contrast, between a federal polity and a system of Parliamentary sovereignty.

**Conditions of federalism.** A federal state requires for its formation two conditions.<sup>1</sup>

<sup>1</sup> The author referred to the following authorities: Story, *Commentaries on the Constitution of the United States* (4th ed., 1873); Bryce, *American Commonwealth* (1910 ed.); British North America Act, 1867; Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (1st ed., 1884); *Constitution Fédérale de la Confédération Suisse du 29 Mai, 1874*; Blumer, *Handbuch des Schweizerischen Bundes-*

There must exist, in the first place, a body of countries such as the Cantons of Switzerland, the Colonies of America, or the Provinces of Canada, so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality. It will also be generally found (if we appeal to experience) that lands which now form part of a federal state were at some stage of their existence bound together by close alliance or by subjection to a common sovereign. It were going further than facts warrant to assert that this earlier connection is essential to the formation of a federal state. But it is certain that where federalism flourishes it is in general the slowly-matured fruit of some earlier and looser connection.

Chapter  
III.

Countries  
capable of  
union.

A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism; the wild scheme entertained (it is said) under the Commonwealth of forming a union between the English Republic and the United Provinces was one of those dreams which may haunt the imagination of politicians but can never be trans-

Existence  
of federal  
sentiment.

*staatsrechtes*; Lowell, *Governments and Parties in Continental Europe* (1896), vol. ii, ch. xi-xiii; Adams and Cunningham, *Swiss Confederation* (1889); and see App. sec. iv, *post*; Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901); Moore, *The Commonwealth of Australia* (2nd ed., 1910); and Bryce, *Studies in History and Jurisprudence* (1901), vol. i, Essay viii (The Constitution of the Commonwealth of Australia).

Part I. formed into fact. If, on the other hand, there be a desire for unity, the wish will naturally find its satisfaction, not under a federal, but under a unitarian constitution; the experience of England and Scotland in the eighteenth and of the states of Italy in the nineteenth century shows that the sense of common interests, or common national feeling, may be too strong to allow of that combination of union and separation which is the foundation of federalism. The phase of sentiment, in short, which forms a necessary condition for the formation of a federal state is that the people of the proposed state should wish to form for many purposes a single nation, yet should not wish to surrender the individual existence of each man's State or Canton. We may perhaps go a little farther, and say, that a federal government will hardly be formed unless many of the inhabitants of the separate States feel stronger allegiance to their own State than to the federal state represented by the common government. This was certainly the case in America towards the end of the eighteenth century, and in Switzerland at the middle of the nineteenth century. In 1787 a Virginian or a citizen of Massachusetts felt a far stronger attachment to Virginia or to Massachusetts than to the body of the confederated States. In 1848 the citizens of Lucerne felt far keener loyalty to their Canton than to the confederacy, and the same thing, no doubt, held true in a less degree of the men of Berne or of Zurich. The sentiment therefore which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent—

the desire for national unity and the determination to maintain the independence of each man's separate State. The aim of federalism is to give effect as far as possible to both these sentiments.

Chapter  
III.

A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of "state rights." The end aimed at fixes the essential character of federalism. For the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States. The preamble to the constitution of the United States recites that "We, the people of the United States, in order  
"to form a more perfect union, establish justice,  
"ensure domestic tranquillity, provide for the common  
"defence, promote the general welfare, and secure the  
"blessings of liberty to ourselves and our posterity,  
"do ordain and establish this constitution for the  
"United States of America." The tenth amendment enacts that "the powers not delegated to the United  
"States by the constitution nor prohibited by it to  
"the States are reserved to the States respectively or  
"to the people." These two statements, which are

The aim of  
federalism

**Part I.** reproduced with slight alteration in the constitution of the Swiss Confederation,<sup>1</sup> point out the aim and lay down the fundamental idea of federalism.

Essential  
character-  
istics of  
federalism.  
United  
States.

From the notion that national unity can be reconciled with state independence by a division of powers under a common constitution between the nation on the one hand and the individual States on the other, flow the three leading characteristics of completely developed federalism,—the supremacy of the constitution—the distribution among bodies with limited and co-ordinate authority of the different powers of government—the authority of the courts to act as interpreters of the constitution.

Supremacy  
of consti-  
tution.

A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution. Neither the President of the United States nor the Houses of Congress, nor the Governor of Massachusetts, nor the Legislature or General Court of Massachusetts, can legally exercise a single power which is inconsistent with the articles of the constitution. This doctrine of the supremacy of the constitution is familiar to every American, but in England even trained lawyers find a difficulty in following it out to its legitimate consequences. The difficulty arises from the fact that under the English constitution no principle is recognised which bears any real resemblance to the doctrine (essential to federalism) that the Constitution constitutes the “supreme law of the land.”<sup>2</sup>

<sup>1</sup> *Constitution Fédérale*, Preamble, and art. 3.

<sup>2</sup> See Constitution of the United States, art. 6 (s. 2).



In England we have laws which may be called fundamental<sup>1</sup> or constitutional because they deal with important principles (as, for example, the descent of the Crown or the terms of union with Scotland) lying at the basis of our institutions, but with us there is no such thing as a supreme law, or law which tests the validity of other laws. There are indeed important statutes, such as the Act embodying the Treaty of Union with Scotland, with which it would be political madness to tamper gratuitously; there are utterly unimportant statutes, such, for example, as the Dentists Act, 1878, which may be repealed or modified at the pleasure or caprice of Parliament; but neither the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law. Each embodies the will of the sovereign legislative power; each can be legally altered or repealed by Parliament; neither tests the validity of the other. Should the Dentists Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed, but no judge would dream of maintaining that the Dentists Act, 1878, was thereby rendered invalid or unconstitutional. The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution.<sup>2</sup>

<sup>1</sup> The expression "fundamental laws of England" became current during the controversy as to the payment of ship-money (1635). See Gardiner, *History of England*, vol. viii (1884), pp. 84, 85.

<sup>2</sup> Cf. especially Kent, *Commentaries* (12th ed., 1873), para. 447-449.

Part I.  
Consequences.  
Written  
constitution.

In the supremacy of the constitution are involved three consequences :—

The constitution must almost necessarily be a "written" constitution.

The foundations of a federal state are a complicated contract. This compact contains a variety of terms which have been agreed to, and generally after mature deliberation, by the States which make up the confederacy. To base an arrangement of this kind upon understandings or conventions would be certain to generate misunderstandings and disagreements. The articles of the treaty, or in other words of the constitution, must therefore be reduced to writing. The constitution must be a written document, and, if possible, a written document of which the terms are open to no misapprehension. The founders of the American Union left at least one great question unsettled. This gap in the constitution gave an opening to the dispute which was the plea, if not the justification, for the War of Secession.<sup>1</sup>

Rigid constitution.

The constitution must be what I have termed a "rigid"<sup>2</sup> or "inexpansive" constitution.

The law of the constitution must be either legally immutable, or else capable of being changed only by

<sup>1</sup> No doubt it is conceivable that a federation might grow up by the force of custom, and under agreements between different States which were not reduced into writing, and it appears to be questionable how far the Achaean League was bound together by anything equivalent to a written constitution. It is, however, in the highest degree improbable, even if it be not practically impossible, that in modern times a federal state could be formed without the framing of some document which, whatever the name by which it is called, would be in reality a written constitution, regulating the rights and duties of the federal government and the States composing the Federation.

<sup>2</sup> See pp. 91. 126 *et seq.*, *ante*.

some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution.

In spite of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable<sup>1</sup> that the founders of a polity should have deliberately omitted to provide any means for lawfully changing its bases. Such an omission would not be unnatural on the part of the authors of a federal union, since one main object of the States entering into the compact is to prevent further encroachments upon their several state rights; and in the fifth article of the United States constitution may still be read the record of an attempt to give to some of its provisions temporary immutability. The question, however, whether a federal constitution necessarily involves the existence of some ultimate sovereign power authorised to amend or alter its terms is of merely speculative interest, for under existing federal governments the constitution will be found to provide the means for its own improvement. It is, at any rate, certain that whenever the founders of a federal government hold the maintenance of a federal system to be of primary importance, supreme

<sup>1</sup> Eminent American lawyers maintain that under the constitution there exists no person, or body of persons, possessed of legal sovereignty, in the sense given by Austin to that term, and it is difficult to see that this opinion involves any absurdity. Cf. Constitution of United States, art. 5. The truth is that a federal constitution partakes of the nature of a treaty, and it is quite conceivable that the authors of the constitution may intend to provide no constitutional means of changing its terms except the assent of all the parties to the treaty.

**Part I.** legislative power cannot be safely vested in any ordinary legislature acting under the constitution.<sup>1</sup> For so to vest legislative sovereignty would be inconsistent with the aim of federalism, namely, the permanent division between the spheres of the national government and of the several States. If Congress could legally change the constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the constitution, and would be as subject to the sovereign power of Congress as is Scotland to the sovereignty of Parliament; the Union would cease to be a federal state, and would become a unitarian republic. If, on the other hand, the legislature of South Carolina could of its own will amend the constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance. Hence the power of amending the constitution has been placed, so to speak, outside the constitution, and one may say, with sufficient accuracy for our present purpose, that the legal sovereignty of the United States resides in the States' governments as forming one aggregate body

<sup>1</sup> Under the constitution of the German Empire the Imperial legislative body could amend the constitution. But the character of the Federal Council (*Bundesrath*) gave ample security for the protection of State rights. No change in the constitution could be effected which was opposed by fourteen votes in the Federal Council. This gave a veto on change to Prussia and to various combinations of some among the other States. The extent to which national sentiment and State patriotism respectively predominated under a federal system may be conjectured from the nature of the authority which had the right to modify the constitution.

represented by three-fourths of the several States at any time belonging to the Union.<sup>1</sup> Now from the necessity for placing ultimate legislative authority in some body outside the constitution a remarkable consequence ensues. Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of more than a century. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.<sup>2</sup>

Every legislative assembly existing under a federal

<sup>1</sup> "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."—*Constitution of the United States*, art. 5. Cf. Austin, *Jurisprudence* (4th ed., 1879), vol. i, p. 278; and see Bryce, *American Commonwealth* (1910 ed.), vol. i, ch. xxxii (The Amendment of the Constitution).

<sup>2</sup> Note, however, the ease with which the provisions of the constitution of the United States with regard to the election of Senators by the Legislature and the transference of such election to the people of each State, were carried through by Amendment xvii, passed in 1913.



## Part I.

Every legislature under federal constitution is a subordinate law-making body.

constitution is merely<sup>1</sup> a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.

There is an apparent absurdity<sup>2</sup> in comparing the legislature of the United States to an English railway company or a municipal corporation, but the comparison is just.<sup>3</sup> Congress can, within the limits of its legal powers, pass laws which bind every man throughout the United States. The Great Eastern Railway Company can, in like manner, pass laws which bind every man throughout the British dominions. A law passed by Congress which is in excess of its legal powers, as contravening the Constitution, is invalid; a law passed by the Great Eastern Railway Company in excess of the powers given by Act of Parliament, or, in other words, by the legal constitution of the company, is also invalid; a law passed by Congress is called an Act of Congress, and if *ultra vires* is described as unconstitutional; a law passed by the Great Eastern Railway Company is called a by-law, and if *ultra vires* is called, not unconstitutional, but invalid. Differences, however, of words must not conceal from us essential similarity in things. Acts of Congress, or of the Legislative Assembly of New York or of Massachusetts, are at bottom simply by-laws, depending for their validity

<sup>1</sup> This is so in the United States, but it need not necessarily be so. The Federal Legislature may be a sovereign power, but may be so constituted that the rights of the States under the constitution are practically protected. This condition of things existed in the German Empire.

<sup>2</sup> See p. 92, note 1, *ante*.

<sup>3</sup> See Intro. pp. liii *et seq.*, *ante*, and Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 140-142.

upon their being within the powers given to Congress or to the state legislatures by the constitution. The by-laws of the Great Eastern Railway Company, imposing fines upon passengers who travel over their line without a ticket, are laws, but they are laws depending for their validity upon their being within the powers conferred upon the Company by Act of Parliament, *i.e.* by the Company's constitution. Congress and the Great Eastern Railway Company are in truth each of them nothing more than subordinate law-making bodies. Their power differs not in degree, but in kind, from the authority of the sovereign Parliament of the United Kingdom.<sup>1</sup>

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition. The constitution, for instance, of the United States delegates special and closely defined powers to the executive, to the legislature, and to the judiciary of the Union, or in effect to the Union itself, whilst it

Distribu-  
tion of  
powers.

<sup>1</sup> See as to by-laws made by municipal corporations, and the dependence of their validity upon the powers conferred upon the corporation: *Johnson v. The Mayor, etc. of Croydon* (1886) 16 Q.B.D. 708; *The Queen v. Powell* (1884) 51 L.T. 92; *Munro v. Watson* (1887) 57 L.T. 366; *Kruse v. Johnson* [1898] 2 Q.B. 91; K. & L. 26. See Bryce, *American Commonwealth* (1910 ed.), vol. i, pp. 245, 246.

Part II. provides that the powers "not delegated to the United States by the constitution nor prohibited by it to the States are reserved to the States respectively or to the people."<sup>1</sup>

Division  
of powers  
carried in  
fact beyond  
necessary  
limit.

This is all the amount of division which is essential to a federal constitution. But the principle of definition and limitation of powers harmonises so well with the federal spirit that it is generally carried much farther than is dictated by the mere logic of the constitution. Thus the authority assigned to the United States under the constitution is not concentrated in any single official or body of officials. The President has definite rights, upon which neither Congress nor the judicial department can encroach. Congress has but a limited, indeed a very limited, power of legislation, for it can make laws upon eighteen topics only; yet within its own sphere it is independent both of the President and of the Federal Courts. So, lastly, the judiciary have their own powers. They stand on a level both with the Presi-

<sup>1</sup> Constitution of the United States, Amendments, art. 10. See provisions of a similar character in the Swiss constitution, *Constitution Fédérale*, art. 3; cf. the constitution of the Dominion of Canada, British North America Act, 1867, ss. 91, 92.

There exists, however, one marked distinction in principle between the constitution of the United States and the constitution of the Dominion of Canada. The constitution of the United States in substance reserves to the separate States all powers not expressly conferred upon the national Government. The Canadian constitution in substance confers upon the Dominion Government all powers not assigned exclusively to the Provinces. In this matter the Swiss constitution follows that of the United States.

The constitution of the Australian Commonwealth follows in effect the example of the constitution of the United States. The powers conferred upon the Commonwealth Parliament are, though very large, definite; the powers reserved to the Parliaments of the States are indefinite. See Commonwealth Constitution, ss. 51, 52, and 107.

dent and with Congress, and their authority (being directly derived from the constitution) cannot, without a distinct violation of law, be trenched upon either by the executive or by the legislature. Where, further, States are federally united, certain principles of policy or of justice must be enforced upon the whole confederated body as well as upon the separate parts thereof, and the very inflexibility of the constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance. Hence spring additional restrictions on the power both of the federation and of the separate states. The United States constitution prohibits both to Congress<sup>1</sup> and to the separate States<sup>2</sup> the passing of a bill of attainder or an *ex post facto* law, the granting of any title of nobility, or in effect the laying of any tax on articles exported from any State,<sup>3</sup> enjoins that full faith shall be given to the public acts and judicial proceedings of every other State, hinders any State from passing any law impairing the obligation of contracts,<sup>4</sup> and prevents every State from entering into any treaty, alliance, or confederation; thus it provides that the elementary principles of justice, freedom of trade, and the rights of individual property shall be absolutely respected throughout the length and breadth of the Union. It further ensures that the right of the people to keep and bear arms shall not be infringed, while it also provides that no member can be expelled from either House of Con-

<sup>1</sup> Constitution of the United States, art. 1, s. 9.

<sup>2</sup> *Ibid.*, art. 1, s. 10.

<sup>3</sup> *Ibid.*, art. 1, s. 9; cf. art. 1, s. 10.

<sup>4</sup> *Ibid.*, art. 1, s. 10.

Part I. gress without the concurrence of two-thirds of the House. Other federal constitutions go far beyond that of the United States in ascribing among constitutional articles either principles or petty rules which are supposed to have a claim of legal sanctity; the Swiss constitution is full of "guaranteed" rights.

Nothing, however, would appear to an English critic to afford so striking an example of the connection between federalism and the "limitation of powers" as the way in which the principles of the federal constitution pervade in America the constitutions of the separate States. In no case does the legislature of any one State possess all the powers of "state sovereignty" left to the States by the Constitution of the Republic, and every state legislature is subordinated to the constitution of the State.<sup>1</sup> The ordinary legislature of New York or Massachusetts can no more change the state constitution than it can alter the Constitution of the United States itself; and, though the topic cannot be worked out here in detail, it may safely be asserted that state government throughout the Union is formed upon the federal model, and (what is noteworthy) that state constitutions have carried much further than the Constitution of the Republic the tendency to clothe with constitutional immutability any rules which strike the people as important. Illinois has em-

<sup>1</sup> Contrast with this the indefinite powers left to State Parliaments under the Commonwealth of Australia Constitution, ss. 106, 107, which did not repeal the constitutions of the States. The Constitutionalists of Australia who created the Commonwealth were as much influenced by the traditions of English parliamentary sovereignty as American legislators had in their dealings with the State constitutions been influenced by the spirit of federalism.



bodied, among fundamental laws, regulations as to elevators.<sup>1</sup>

Chapter  
III.

But here, as in other cases, there is great difficulty in distinguishing cause and effect. If a federal form of government has affected, as it probably has, the constitutions of the separate States, it is certain that features originally existing in the State constitutions have been reproduced in the constitution of the Union; and, as we shall see in a moment, the most characteristic institution of the United States, the Federal Court, appears to have been suggested at least to the founders of the Republic, by the relation which before 1789 already existed between the state tribunals and the state legislatures.<sup>2</sup>

The tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities is specially noticeable, because it forms the essential distinction between a federal system such as that of America or Switzerland, and a unitarian system of government, such as that which

Division of powers distinguishes federal from unitarian system of government.

<sup>1</sup> See *Munn v. Illinois* (1887) 4 Otto, 113.

<sup>2</sup> European critics of American federalism have paid in general too little attention to the working and effect of the State constitutions, and have overlooked the great importance of the action of the State legislatures. See Boutmy, *Etudes de Droit constitutionnel* (2nd ed., 1888), pp. 103-111.

"It has been truly said that nearly every provision of the Federal constitution that has worked well is one borrowed from or suggested by some State constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself."—Bryce, *American Commonwealth* (1910 ed.), vol. i, p. 35. One capital merit of Bryce's book was that it for the first time revealed, even to those who had already studied American institutions, the extent to which the main features of the constitution of the United States were suggested to its authors by the characteristics of the State Governments.

Part I.

exists in England or Russia. We talk indeed of the English constitution as resting on a balance of powers, and as maintaining a division between the executive, the legislative, and the judicial bodies. These expressions have a real meaning. But they have quite a different significance as applied to England from the sense which they bear as applied to the United States. All the power of the English state is concentrated in the Imperial Parliament, and all departments of government are legally subject to Parliamentary despotism. Our judges are independent, in the sense of holding their office by a permanent tenure, and of being raised above the direct influence of the Crown or the Ministry ; but the judicial department does not pretend to stand on a level with Parliament ; its functions might be modified at any time by an Act of Parliament ; and such a statute would be no violation of the law. The Federal Judiciary, on the other hand, are co-ordinate with the President and with Congress, and cannot without a revolution be deprived of a single right by President or Congress. So, again, the executive and the legislature are with us distinct bodies, but they are not distinct in the sense in which the President is distinct from and independent of the Houses of Congress. The House of Commons interferes with administrative matters, and the Ministry are in truth placed and kept in office by the House. A modern Cabinet would not hold power for a week if censured by a newly elected House of Commons. An American President may retain his post and exercise his very important functions even though his bitterest opponents command majorities both in the Senate and

in the House of Representatives. Unitarianism, in short, means the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.

Whenever there exists, as in Belgium or in France, a more or less rigid constitution, the articles of which cannot be amended by the ordinary legislature, the difficulty has to be met of guarding against legislation inconsistent with the constitution. As Belgian and French statesmen have created no machinery for the attainment of this object, we may conclude that they considered respect for the constitution to be sufficiently secured by moral or political sanctions, and treated the limitations placed on the power of Parliament rather as maxims of policy than as true laws. During a period, at any rate of more than sixty years, no Belgian judge has (it is said) ever pronounced a Parliamentary enactment unconstitutional. No French tribunal, as has been already pointed out, would hold itself at liberty to disregard an enactment, however unconstitutional, passed by the National Assembly, inserted in the *Bulletin des Lois*, and supported by the force of the government; and French statesmen may well have thought, as de Tocqueville certainly did think, that in France possible Parliamentary invasions of the constitution were a less evil than the participation of the judges in political conflicts. France, in short, and Belgium being governed under unitarian constitutions, the non-sovereign character of the legislature is in each

Authority  
of Courts.

Part I. case an accident, not an essential property of their polity. Under a federal system it is otherwise. The legal supremacy of the constitution is essential to the existence of the state; the glory of the founders of the United States is to have devised or adopted arrangements under which the constitution became in reality as well as name the supreme law of the land. This end they attained by adherence to a very obvious principle, and by the invention of appropriate machinery for carrying this principle into effect.

How  
authority  
of the  
Courts is  
exerted.

The principle is clearly expressed in the Constitution of the United States. "This constitution," runs article 6, "and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."<sup>1</sup> The import of these expressions is unmistakable. "Every Act of Congress," writes Chancellor Kent, "and every Act of the legislatures of the States, and every part of the constitution of any State, which are repugnant to the Constitution of the United States, are necessarily void. This is a clear and settled principle of [our] constitutional jurisprudence."<sup>2</sup> The legal duty therefore of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the state legis-

<sup>1</sup> Constitution of the United States, art. 6 (s. 2).

<sup>2</sup> Kent, *Commentaries* (12th ed., 1873), vol. i, para. 314; cf. *ibid.*, para. 449.

latures, which is inconsistent with the Constitution of the United States. His duty is as clear as that of an English judge called upon to determine the validity of a by-law made by the Great Eastern or any other Railway Company. The American judge must in giving judgment obey the terms of the constitution, just as his English brother must in giving judgment obey every Act of Parliament bearing on the case.

To have laid down the principle with distinctness is inuch, but the great problem was how to ensure that the principle should be obeyed ; for there existed a danger that judges depending on the federal government should wrest the constitution in favour of the central power, and that judges created by the States should wrest it in favour of State rights or interests. This problem has been solved by the creation of the Supreme Court and of the Federal Judiciary.

Supremacy of constitution secured by creation of Supreme Court.

Of the nature and position of the Supreme Court itself thus much alone need for our present purpose be noted. The court derives its existence from the constitution, and stands therefore on an equality with the President and with Congress ; the members thereof (in common with every judge of the Federal Judiciary) hold their places during good behaviour, at salaries which cannot be diminished during a judge's tenure of office.<sup>1</sup> The Supreme Court stands at the head of the whole federal judicial department, which, extending by its subordinate courts throughout the Union, can execute its judgments through its own officers without requiring the aid of state officials.

Nature and action of Supreme Court.

<sup>1</sup> Constitution of the United States, art. 3, ss. 1, 2.



**Part I.**

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The Supreme Court, though it has a certain amount of original jurisdiction, derives its importance from its appellate character; it is on every matter which concerns the interpretation of the constitution a supreme and final court of appeal from the decision of every court (whether a Federal court or a State court) throughout the Union. It is in fact the final interpreter of the constitution and therefore has authority to pronounce finally as a court of appeal whether a law passed either by Congress or by the legislature of a State, *e.g.* New York, is or is not constitutional. To understand the position of the Supreme Court we must bear in mind that there exist throughout the Union two classes of courts in which proceedings can be commenced, namely, the subordinate federal courts deriving their authority from the constitution, and the state courts, *e.g.* of New York or Massachusetts, created by and existing under the state constitutions; and that the jurisdiction of the federal judiciary and the state judiciary is in many cases concurrent, for though the jurisdiction of the federal courts is mainly confined to cases arising under the constitution and laws of the United States, it is also frequently dependent upon the character of the parties, and though there are cases with which no state court can deal, such a court may often entertain cases which might be brought in a federal court, and constantly has to consider the effect of the constitution on the validity either of a law passed by Congress or of state legislation. That the Supreme Court should be a court of appeal from the decision of the subordinate federal tribunals is a matter which excites no surprise. The point to be noted is that it is also a court of

appeal from decisions of the Supreme Court of any State, *e.g.* New York, which turn upon or interpret the articles of the constitution or Acts of Congress. The particular cases in which a party aggrieved by the decision of a state court has a right of appeal to the Supreme Court of the United States are regulated by an Act of Congress of 24th September 1789, the twenty-fifth section of which provides that "a final judgment or decree, in any suit in the highest court of law or equity of a State, may be brought up on error in point of law, to the Supreme Court of the United States, provided the validity of a treaty, or statute of, or authority exercised under the United States, was drawn in question in the state court, and the decision was against that validity; or provided the validity of any state authority was drawn in question, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favour of its validity; or provided the construction of any clause of the constitution or of a treaty, or statute of, or commission held under the United States, was drawn in question, and the decision was against the title, right, privilege, or exemption, specially claimed under the authority of the Union."<sup>1</sup> Strip this enactment of its technicalities and it comes to this. A party to a case in the highest court, say of New York, who bases his claim or defence upon an article in the constitution or law made under it, stands in this position: If judgment be in his favour there is no further appeal; if judgment goes against him, he has a right of appeal to the Supreme Court of the United States. Any

<sup>1</sup> Kent, *Commentaries* (12th ed., 1873), vol. i, paras. 299, 300.

**Part I.** lawyer can see at a glance how well devised is the arrangement to encourage state courts in the performance of their duty as guardians of the constitution, and further that the Supreme Court thereby becomes the ultimate arbiter of all matters affecting the constitution.

Let no one for a moment fancy that the right of every court, and ultimately of the Supreme Court, to pronounce on the constitutionality of legislation and on the rights possessed by different authorities under the constitution is one rarely exercised, for it is in fact a right which is constantly exerted without exciting any more surprise on the part of the citizens of the Union than does in England a judgment of the King's Bench Division treating as invalid the by-law of a railway company. The American tribunals have dealt with matters of supreme consequence; they have determined that Congress has the right to give priority to debts due to the United States,<sup>1</sup> can lawfully incorporate a bank,<sup>2</sup> has a general power to levy or collect taxes without any restraint, but subject to definite principles of uniformity prescribed by the constitution; the tribunals have settled what is the power of Congress over the militia, who is the person who has a right to command it,<sup>3</sup> and that the power exercised by Congress during the War of Secession of issuing paper money was valid.<sup>4</sup> The courts again have controlled the power of the separate States fully as

<sup>1</sup> Kent, *op. cit.*, vol. i, paras. 244-248.

<sup>2</sup> *Ibid.*, paras. 248-254.

<sup>3</sup> *Ibid.*, paras. 262-266.

<sup>4</sup> Story, *Commentaries on the Constitution* (4th ed., 1873), vol. ii, secs. 1116, 1117.

See *Hepburn v. Griswold* (1870) 8 Wallace 603, and *Knox v. Lee* (1871) 12 Wallace 457.

vigorously as they have defined the authority of the United States. The judiciary have pronounced unconstitutional every *ex post facto* law, every law taxing even in the slightest degree articles exported from any State, and have again deprived of effect state laws impairing the obligation of contracts. To the judiciary in short are due the maintenance of justice, the existence of internal free trade, and the general respect for the rights of property; whilst a recent decision shows that the courts are prepared to uphold as consistent with the Constitution any laws which prohibit modes of using private property, which seem to the judges inconsistent with public interest.<sup>1</sup> The power moreover of the courts which maintains the articles of the constitution as the law of the land, and thereby keeps each authority within its proper sphere, is exerted with an ease and regularity which has astounded and perplexed continental critics. The explanation is that while the judges of the United States control the action of the constitution, they nevertheless perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The court never directly pronounces any opinion whatever upon an Act of Congress. What the court does do is simply to determine that in a given case *A* is or is not entitled to recover judgment against *X*; but in determining that case the court may decide that an Act of

<sup>1</sup> *Munn v. Illinois* (1877) 4 Otto 113. See especially the Judgments of Marshall, C.J., collected in *The Writings of John Marshall upon the Federal Constitution* (1839).

## Part I.

The true  
merit of  
the found-  
ers of the  
United  
States.

Congress is not to be taken into account, since it is an Act beyond the constitutional powers of Congress.<sup>1</sup>

If any one thinks this is a distinction without a difference he shows some ignorance of politics, and does not understand how much the authority of a court is increased by confining its action to purely judicial business. But persons who, like de Tocqueville, have fully appreciated the wisdom of the statesmen who created the Union, have formed perhaps an exaggerated estimate of their originality. Their true merit was that they applied with extraordinary skill the notions which they had inherited from English law to the novel circumstances of the new republic. To any one imbued with the traditions of English procedure it must have seemed impossible to let a court decide upon anything but the case before it. To any one who had inhabited a colony governed under a charter the effect of which on the validity of a colonial law was certainly liable to be considered by the Privy Council, there was nothing startling in empowering the judiciary to pronounce in given cases upon the constitutionality of Acts passed by assemblies whose powers were limited by the constitution, just as the authority of the colonial legislatures was limited by charter or by Act of Parliament. To a French jurist, indeed, filled with the traditions of the French Parliaments, all this might well be incomprehensible, but an English lawyer can easily see that the fathers of the republic treated Acts of Congress as English Courts treat by-laws, and in forming the Supreme Court may probably have had in mind the functions of the Privy

<sup>1</sup> See chap. ii, pp. 94-99, *ante*.



Council. It is still more certain that they had before their eyes cases in which the tribunals of particular States had treated as unconstitutional, and therefore pronounced void, Acts of the state legislature which contravened the state constitution. The earliest case of declaring a law unconstitutional dates (it is said) from 1786, and took place in Rhode Island, which was then, and continued till 1842, to be governed under the charter of Charles II. An Act of the legislature was declared unconstitutional by the Courts of North Carolina in 1787<sup>1</sup> and by the Courts of Virginia in 1788,<sup>2</sup> whilst the constitution of the United States was not adopted till 1789, and *Marbury v. Madison*, the first case in which the Supreme Court dealt with the question of constitutionality, was decided in 1803.<sup>3</sup>

But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be "the law of the land," and in so doing created modern federalism. For the essential characteristics of federalism—the supremacy of the constitution—the distribution of powers—the authority of the judiciary—reappear, though no doubt with modifications, in every true federal state.

Turn for a moment to the Canadian Dominion. The preamble to the British North America Act, 1867, asserts with diplomatic inaccuracy that the Provinces

The  
Canadian  
Dominion.

<sup>1</sup> Martin 421.

<sup>2</sup> 1 Virginia Cases 198.

<sup>3</sup> 1 Cranch 137. For the facts as to the early action of the State Courts in declaring legislative enactments unconstitutional the author was indebted, as for much other useful criticism, to his friend Professor Thayer of Harvard.

Part I.

of the present Dominion have expressed their desire to be united into one Dominion "with a constitution similar in principle to that of the United *Kingdom*." If preambles were intended to express anything like the whole truth, for the word "*Kingdom*" ought to have been substituted "*States*": since it is clear that the Constitution of the Dominion is in its essential features modelled on that of the Union. This is indeed denied, but in my judgment without adequate grounds, by competent Canadian critics.<sup>1</sup> The differences between the institutions of the United States and of the Dominion are of course both considerable and noteworthy. But no one can study the provisions of the British North America Act, 1867, without seeing that its authors had the American Constitution constantly before their eyes, and that if Canada were an independent country it would be a Confederacy governed under a constitution very similar to that of the United States. The constitution is the law of

<sup>1</sup> The difference between the judgment as to the character of the Canadian constitution formed by the author and the judgment of competent and friendly Canadian critics, was summarised and explained as follows: "If we look at the federal character of the constitution of the Dominion, we must inevitably regard it as a copy, though by no means a servile copy, of the constitution of the United States. Now in the present work the Canadian constitution is regarded exclusively as a federal government. Hence my assertion, which I still hold to be correct, that the government of the Dominion is modelled on that of the Union. If, on the other hand, we compare the Canadian Executive with the American Executive, we perceive at once that Canadian government is modelled on the system of Parliamentary cabinet government as it exists in England, and does not in any wise imitate the Presidential government of America. This, it has been suggested to me by a friend well acquainted with Canadian institutions, is the point of view from which they are looked upon by my Canadian critics, and is the justification for the description of the Constitution of the Dominion given in the preamble to the British North America Act, 1867. The suggestion is a just and valuable one; in deference to it some of the expressions used in the earlier editions of this book have undergone a slight modification."

the land; it cannot be changed (except within narrow limits allowed by the British North America Act, 1867) either by the Dominion Parliament<sup>1</sup> or by the Provincial Parliaments;<sup>2</sup> it can be altered only by the sovereign power of the British Parliament.<sup>3</sup> Nor does this arise from the Canadian Dominion being a dependency. New Zealand is, like Canada, a colony, but the New Zealand Parliament can with the assent of the Crown do what the Canadian Parliament cannot do—change the colonial constitution. Throughout the Dominion, therefore, the constitution is in the strictest sense the immutable law of the land. Under this law again, you have, as you would expect, the distribution of powers among bodies of co-ordinate authority;<sup>4</sup> though undoubtedly the powers bestowed on the Dominion Government and Parliament are greater when compared with the powers reserved to the Provinces than are the powers which the Constitution of the United States gives to the federal government. In nothing is this more noticeable than in the authority given to<sup>5</sup> the Dominion Government to disallow Provincial Acts.<sup>6</sup>

<sup>1</sup> See, however, British North America Act, 1867, s. 94, which gives the Dominion Parliament a limited power (when acting in conjunction with a Provincial legislature) of changing to a certain extent the provisions of the British North America Act, in order to secure uniformity of laws relating to property and civil rights in three Provinces.

<sup>2</sup> The legislatures of each Province have, nevertheless, authority to make laws for "the amendment from time to time, notwithstanding "anything" [in the British North America Act, 1867] "of the "Constitution of the Province, except as regards the office of Lieutenant "Governor." See British North America Act, 1867, s. 92.

<sup>3</sup> See for examples of amendments of the Dominion Constitution by an Imperial statute, the Parliament of Canada Act, 1875; the British North America Acts, 1915, 1916, and 1930.

<sup>4</sup> British North America Act, 1867, ss. 91, 92. <sup>5</sup> *Ibid.*, ss. 56, 90.

<sup>6</sup> Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (1st ed., 1884), p. 76.

## Part I.

This right was possibly given with a view to obviate altogether the necessity for invoking the law courts as interpreters of the constitution; the founders of the Confederation appear in fact to have believed that "the care taken to define the respective powers of the several legislative bodies in the Dominion would prevent any troublesome or dangerous conflict of authority arising between the central and local governments."<sup>1</sup> The futility, however, of a hope grounded on a misconception of the nature of federalism is proved by the existence of two thick volumes of reports filled with cases on the constitutionality of legislative enactments, and by a long list of decisions as to the respective powers possessed by the Dominion and by the Provincial Parliaments—judgments given by the true Supreme Court of the Dominion, namely, the Judicial Committee of the Privy Council. In Canada, as in the United States, the courts inevitably become the interpreters of the constitution.<sup>2</sup>

The Swiss  
Confederation.

Swiss federalism repeats, though with noteworthy variations, the essential traits of the federal polity as it exists across the Atlantic.<sup>3</sup> The constitution is the law of the land, and cannot be changed either by the federal or by the cantonal legislative bodies; <sup>4</sup> the constitution enforces a distribution of the powers be-

<sup>1</sup> Bourinot, *op. cit.*, p. 694.

<sup>2</sup> For a recent authoritative exposition of the Canadian constitution, see W. P. M. Kennedy, *The Constitution of Canada, 1534-1937* (1938).—Ed.

<sup>3</sup> See App. sec. iv for note of Bibliography.

<sup>4</sup> This needs qualification. The Federal Assembly has power to change the constitution, subject to the approval of the electors and a majority of the Cantons (*Constitution Fédérale*, Arts. 85 (14), and 123). In practice the Federal Legislative Assembly plays an important part in every change of the constitution.—Ed.

tween the national government and the Cantons, and directly or indirectly defines and limits the power of every authority existing under it. The Common Government has in Switzerland, as in America, three organs—a Federal Legislature, a Federal Executive (*Bundesrath*), and a Federal Court (*Bundesgericht*).

Of the many interesting and instructive peculiarities which give to Swiss federalism an individual character, this is not the occasion to write in detail. It lies, however, within the scope of this chapter to note that the Constitution of the Confederation differs in two most important respects from that of the United States. It does not, in the first place, establish anything like the accurate division between the executive and the judicial departments of government which exists both in America and in Canada; the Executive exercises, under the head of “administrative law,” some functions<sup>1</sup> of a judicial character, and thus, for example, till 1893 dealt in effect with questions<sup>2</sup> having reference to the rights of religious bodies. The Federal Assembly is the final arbiter on all questions as to the respective jurisdiction of the Executive and of the Federal Court. The judges of that court are elected by the Federal Assembly, they are occupied greatly with questions of public law (*Staatsrecht*), and so experienced a statesman as Dr. Dubs laments that the Federal Court should possess jurisdiction in matters of private law.<sup>3</sup> When to this it is added that the judgments of

<sup>1</sup> See for example, p. 610, note, *post*.

<sup>2</sup> The decision thereof belonged till 1893 to the Assembly, guided by the Federal Council; it now belongs to the Federal Court. See Dubs, *Das öffentliche Recht*, ii (2nd ed.), pp. 92-95; Lowell, *Governments and Parties in Continental Europe* (1896), vol. ii, pp. 217, 218.

<sup>3</sup> *Constitution Fédérale*, art. 113.



Part I. the Federal Court are executed by the Government, it at once becomes clear that, according to any English standard, Swiss statesmanship has failed as distinctly as American statesmanship has succeeded in keeping the judicial apart from the executive department of government, and that this failure constitutes a serious flaw in the Swiss Constitution. That constitution, in the second place, does not in reality place the Federal Court on an absolute level with the Federal Assembly. That tribunal cannot question the constitutionality of laws or decrees passed by the Federal Parliament.<sup>1</sup> From this fact one might suppose that the Federal Assembly is (unlike Congress) a sovereign body, but this is not so. The reason why all Acts of the Assembly must be treated as constitutional by the Federal Tribunal is that the constitution itself almost precludes the possibility of encroachment upon its articles by the federal legislative body. No legal revision can take place without the assent both of a majority of Swiss citizens and of a majority of the Cantons, and an ordinary law duly passed by the Federal Assembly may be legally annulled by a popular veto. The authority of the Swiss Assembly nominally exceeds the authority of Congress, because in reality the Swiss legislative body is weaker than Congress. For while in each case there lies in the background a legislative sovereign capable of controlling the action of the ordinary legislature, the sovereign power is far more easily brought into play in Switzerland than in America.

<sup>1</sup> *Constitution Fédérale*, art. 113; and Dubs, *op. cit.*, ii (2nd ed.), pp. 92-95. The reason is that all such laws have the tacit consent of the majority. If not, a referendum would be demanded to change them.

When the sovereign power can easily enforce its will, it may trust to its own action for maintaining its rights; when, as in America, the same power acts but rarely and with difficulty, the courts naturally become the guardians of the sovereign's will expressed in the articles of the constitution.

Chapter  
III.

Our survey from a legal point of view of the characteristics common to all federal governments forcibly suggests conclusions of more than merely legal interest, as to the comparative merits of federal government, and the system of Parliamentary sovereignty.

Comparison  
between  
system of  
federalism  
and of par-  
liamentary  
sovereignty.

Federal government means weak government.<sup>1</sup>

Weakness  
of federal-  
ism.

The distribution of all the powers of the state among co-ordinate authorities necessarily leads to the

<sup>1</sup> This weakness springs from two different causes: first, the division of powers between the central Government and the States; secondly, the distribution of powers between the different members (e.g. the President and the Senate) of the national Government. The first cause of weakness is inherent in the federal system; the second cause of weakness is not (logically at least) inherent in federalism. Under a federal constitution the whole authority of the national Government might conceivably be lodged in one person or body, but we may feel almost certain that in practice the fears entertained by the separate States of encroachments by the central Government on their State rights will prohibit such a concentration of authority.

The statement that federal government means weak government should be qualified or balanced by the consideration that a federal system sometimes makes it possible for different communities to be united as one State when they otherwise could not be united at all. The bond of federal union may be weak, but it may be the strongest bond which circumstances allow.

The failure and the calamities of the Helvetic Republic are a warning against the attempt to force upon more or less independent states a greater degree of political unity than they will tolerate. [The view expressed in the last paragraph would appear to be true of the United States; it is not, according to Swiss lawyers, any longer true that in Switzerland federation means weak government.—  
Ed.]

Part I. result that no one authority can wield the same amount of power as under a unitarian constitution is possessed by the sovereign. A scheme again of checks and balances in which the strength of the common government is so to speak pitted against that of the state governments leads, on the face of it, to a certain waste of energy. A federation therefore will always be at a disadvantage in a contest with unitarian states of equal resources. Nor does the experience either of the United States or of the Swiss confederation invalidate this conclusion. The Union is threatened by no powerful neighbours and needs no foreign policy.<sup>1</sup> Circumstances unconnected with constitutional arrangements enable Switzerland to preserve her separate existence, though surrounded by powerful and at times hostile nations. The mutual jealousies moreover incident to federalism do visibly weaken the Swiss Republic. Thus, to take one example only, each member of the Executive must belong to a different canton.<sup>2</sup> But this rule may exclude from the government statesmen of high merit, and therefore diminish the resources of the state. A rule that each member of the Cabinet should be the native of a different county would appear to Englishmen palpably absurd. Yet this absurdity is forced upon Swiss politicians, and affords one among numerous instances in which the efficiency of the public service is sacrificed to the requirements of federal sentiment. Switzerland, moreover, is governed under a form of democratic federalism which tends towards

<sup>1</sup> The latter part of this statement was perhaps less true in 1908 than it was in 1885.

<sup>2</sup> *Constitution Fédérale*, art. 96.

unitarianism. Each revision increases the authority of the nation at the expense of cantonal independence. This is no doubt in part due to the desire to strengthen the nation against foreign attack. It is perhaps also due to another circumstance. Federalism, as it defines, and therefore limits, the powers of each department of the administration, is unfavourable to the interference or to the activity of government. Hence a federal government can hardly render services to the nation by undertaking for the national benefit functions which may be performed by individuals. This may be a merit of the federal system ; it is, however, a merit which does not commend itself to modern democrats, and no more curious instance can be found of the inconsistent currents of popular opinion which may at the same time pervade a nation or a generation than the coincidence in England of a vague admiration for federalism alongside with a far more decided feeling against the doctrines of so-called *laissez faire*. A system meant to maintain the *status quo* in politics is incompatible with schemes for wide social innovation.

Federalism tends to produce conservatism.

Conservatism of  
federalism.

This tendency is due to several causes. The constitution of a Federal state must, as we have seen, generally be not only a written but a rigid constitution, that is, a constitution which cannot be changed by any ordinary process of legislation. Now this essential rigidity of federal institutions is almost certain to impress on the minds of citizens the idea that any provision included in the constitution is immutable and, so to speak, sacred. The least observation of American politics shows how deeply the notion

Part I. that the constitution is something placed beyond the reach of amendment has impressed popular imagination. The difficulty of altering the constitution produces conservative sentiment, and national conservatism doubles the difficulty of altering the constitution. The House of Lords has lasted for centuries; the American Senate has now existed for more than one hundred years, yet to abolish or alter the House of Lords might turn out to be an easier matter than to modify the constitution of the Senate.<sup>1</sup> To this one must add that a federal constitution always lays down general principles which, from being placed in the constitution, gradually come to command a superstitious reverence, and thus are in fact, though not in theory, protected from change or criticism. The principle that legislation ought not to impair obligation of contracts has governed the whole course of American opinion. Of the conservative effect of such a maxim when forming an article of the constitution we may form some measure by the following reflection. If any principle of the like kind had been recognised in England as legally binding on the courts, the Irish Land Act would have been unconstitutional and void; the Irish Church Act, 1869, would, in great part at least, have been from a legal point of view so much waste paper, and there would have been great difficulty in legislating in the way in which the English Parliament has legislated for the reform of the Universities. One maxim only among those embodied in the Constitution of the United States would, that is to say, have been sufficient if adopted in England to have arrested the most vigorous efforts of recent Parliamentary legislation.

<sup>1</sup> See, however, note 2, p. 149, *ante*.



Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

Chapter  
III.

Legal  
spirit of  
federalism.

That in a confederation like the United States the courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at a given moment the master of the constitution.<sup>1</sup> Nothing puts in a

<sup>1</sup> The expression "master of the constitution" has been criticised on the ground of exaggeration (Sidgwick, *Elements of Politics* (1897), p. 616). The expression, however, though undoubtedly strong, is, it is submitted, justifiable, if properly understood. It is true, as Sidgwick well pointed out, that the action of the Supreme Court is restrained, first, by the liability of the judges to impeachment for misconduct, and, secondly, by the fear of provoking disorder. And to these restraints a third and more efficient check must be added. The numbers of the court may be increased by Congress, and its decision in a given case has not even in theory that force as a decisive precedent which is attributable to a decision of the House of Lords; hence if the Supreme Court were to pronounce judgments which ran permanently counter to the opinion of the party which controlled the government of the Union, its action could be altered by adding to the Court lawyers who shared the convictions of the ruling party. (See Davis, *American Constitutions; the Relations of the Three Departments as adjusted by a Century* (1885), pp. 52-54). It would be idle therefore to maintain, what certainly cannot be asserted with truth, that the Supreme Court is the sovereign of the United States. It is, however, true that at any given moment the court may, on a case coming before it, pronounce a judgment which determines the working of the con-

Part I. stronger light the inevitable connection between federalism and the prominent position of the judicial body than the history of modern Switzerland. The statesmen of 1848 desired to give the *Bundesgericht* a far less authoritative position than is possessed by the American Supreme Court. They in effect made the Federal Assembly for most, what it still is for some, purposes, a final Court of Appeal. But the necessities of the case were too strong for Swiss statesmanship; the revision of 1874 greatly increased the power of the Federal Tribunal.

Dangers  
arising  
from posi-  
tion of  
judiciary.

From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution, a special danger arises lest the judiciary should be unequal to the burden laid upon them. In no country has greater skill been expended on constituting an august and impressive national tribunal than in the United States. Moreover, as already

stitution. The decision in the *Dred Scott Case* for example, and still more the judicial opinions delivered in deciding the case, had a distinct influence on the interpretation of the constitution both by slave-owners and by Abolitionists. In terming the court the "master of the constitution" it was not intended to suggest the exercise by it of irregular or revolutionary powers. No doubt, again, the Supreme Court may be influenced in delivering its judgments by fear of provoking violence. This apprehension is admittedly a limit to the full exercise of its theoretical powers by the most absolute of despots. It was never intended to assert that the Supreme Court, which is certainly not the sovereign of the United States, was in the exercise of its functions free from restraints which limit the authority of even a sovereign power. It must further be noted, in considering how far the Supreme Court could in fact exert all the authority theoretically vested in it, that it is hardly conceivable that the opinions of the court as to, say, the constitutional limits to the authority of Congress should not be shared by a large number of American citizens. Whenever in short the court differed in its view of the constitution from that adopted by the President or the Congress, the Court, it is probable, could rely on a large amount of popular support.

pointed out, the guardianship of the constitution is in America confided not only to the Supreme Court but to every judge throughout the land. Still it is manifest that even the Supreme Court can hardly support the duties imposed upon it. No one can doubt that the varying decisions given in the legal-tender cases, or in the line of recent judgments of which *Munn v. Illinois*<sup>1</sup> is a specimen, show that the most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will necessarily be swayed by political feeling and by reasons of state. But the moment that this bias becomes obvious a court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law. American critics indeed are to be found who allege that the Supreme Court not only is proving but always has proved too weak for the burden it is called upon to bear, and that it has from the first been powerless whenever it came into conflict with a State, or could not count upon the support of the Federal Executive. These allegations undoubtedly hit a weak spot in the constitution of the great tribunal. Its judgments are without force, at any rate as against a State if the President refuses the means of putting them into execution. "John Marshall," said President Jackson, according to a current story,<sup>2</sup> "has delivered his judgment; let him now enforce it, if he can"; and the judgment

<sup>1</sup> (1877) 4 Otto 113.

<sup>2</sup> See Sumner, *Andrew Jackson* (1882: American Statesmen Series), p. 182.

Part I. was never put into force. But the weight of criticisms repeated from the earliest days of the Union may easily be exaggerated.<sup>1</sup> Laymen are apt to mistake the growth of judicial caution for a sign of judicial weakness. Foreign observers, moreover, should notice that in a federation the causes which bring a body such as the Supreme Court into existence, also supply it with a source of ultimate power. The Supreme Court and institutions like it are the protectors of the federal compact, and the validity of that compact is, in the long run, the guarantee for the rights of the separate States. It is the interest of every man who wishes the federal constitution to be observed, that the judgments of the federal tribunals should be respected. It is therefore no bold assumption that, as long as the people of the United States wish to keep up the balanced system of federalism, they will ultimately compel the central government to support the authority of the federal court. Critics of the court are almost driven to assert that the American people are indifferent to State Rights. The assertion may or may not be true; it is a matter on which no English critic should speak with confidence. But censures on the working of a federal court tell very little against such an institution if they establish nothing more than the almost self-evident proposition that a federal tribunal will be ineffective and superfluous when the United States shall have ceased to be in reality a federation.

<sup>1</sup> See Davis, *American Constitutions; the Relations of the Three Departments as adjusted by a Century* (1885), pp. 55-57. Davis is distinctly of opinion that the power of the courts both of the United States and of the separate States has increased steadily since the foundation of the Union.

A federal court has no proper place in a unitarian Republic.

Chapter  
III.

Judges, further, must be appointed by some authority which is not judicial, and where decisions of a court control the action of government there exists an irresistible temptation to appoint magistrates who agree (honestly it may be) with the views of the executive. A strong argument pressed against Mr. Blaine's election was, that he would have the opportunity as President of nominating four judges, and that a politician allied with railway companies was likely to pack the Supreme Court with men certain to wrest the law in favour of mercantile corporations. The accusation may have been baseless; the fact that it should have been made, and that even "Republicans" should declare that the time had come when "Democrats" should no longer be excluded from the Bench of the United States, tells plainly enough of the special evils which must be weighed against the undoubted benefits of making the courts rather than the legislature the arbiters of the constitution.

That a federal system again can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation. Federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing

Federalism  
impossible  
where a  
legal spirit  
does not  
prevail.



Part I. nation. Constitutional questions arising out of either the constitutions of the separate States or the articles of the federal constitution are of daily occurrence and constantly occupy the courts. Hence the citizens become a people of constitutionalists, and matters which excite the strongest popular feeling, as, for instance, the right of Chinese to settle in the country, are determined by the judicial Bench, and the decision of the Bench is acquiesced in by the people. This acquiescence or submission is due to the Americans inheriting the legal notions of the common law, *i.e.* of the "most legal system of law" (if the expression may be allowed) in the world. Tocqueville long ago remarked that the Swiss fell far short of the Americans in reverence for law and justice.<sup>1</sup> The events of the last sixty years suggest that he perhaps underrated Swiss submission to law. But the law to which Switzerland is accustomed recognises wide discretionary power on the part of the executive, and has never fully severed the functions of the judge from those of the government. Hence Swiss federalism fails, just where one would expect it to fail, in maintaining that complete authority of the courts which is necessary to the perfect federal system. But the Swiss, though they may not equal the Americans in reverence for judicial decisions, are a law-respecting nation. One may well doubt whether there are many states to be found where the mass of the people would leave so much political influence to the courts. Yet any nation who cannot acquiesce in the finality of possibly mistaken judgments is hardly fit to form part of a federal state.<sup>2</sup>

<sup>1</sup> See passage cited, pp. 184-187, *post*.

<sup>2</sup> *Cf.*, however, App. sec. iv.

PART II

THE RULE OF LAW



## CHAPTER IV

### THE RULE OF LAW: ITS NATURE AND GENERAL APPLICATIONS<sup>1</sup>

Two features have at all times since the Norman Conquest characterised the political institutions of England.

Chapter  
IV.

The Rule  
of Law.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer of order. The maxim of the courts, *tout fuit en lui et vient de lui al commencement*,<sup>2</sup> was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.<sup>3</sup>

<sup>1</sup> Dr. Jennings among writers in England is the most formidable critic of Dicey and in particular of this Part. See especially *The Law and the Constitution* (2nd ed., 1938), ch. i, ii, vi, and App. ii, and the article, "In Praise of Dicey," in *Public Administration*, vol. xi, No. 2 (April, 1935).—Ed.

<sup>2</sup> Year Books, xxiv Edward III., cited Gneist, *Englische Verwaltungsrecht* (1867), vol. i, p. 454.

<sup>3</sup> See Part i, *ante*.

## Part II.

The second of these features, which is closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the courts, "*La ley est le plus haute inheritance, que le roy ad ; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit. nul roi, et nul inheritance sera.*"<sup>1</sup>

This supremacy of the law, or the security given under the English constitution to the rights of individuals looked at from various points of view, forms the subject of this part of this treatise.

The rule of law in England noticed by foreign observers.

Foreign observers of English manners, such for example as Voltaire, De Lolme, de Tocqueville, or Gneist, have been far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law ; and admiration or astonishment at the legality of English habits and feeling is nowhere better expressed than in a curious passage from de Tocqueville's writings, which compares the Switzerland and the England of 1836 in respect of the spirit which pervades their laws and manners.

de Tocqueville on the want of respect for law in Switzerland and contrast with England.

"I am not about," he writes, "to compare Switzerland<sup>2</sup> with the United States, but with Great Britain. When you examine the two countries, or even if you only pass through them, you perceive, in my judgment, the most astonishing differences between them. Take it all in all, England seems to be much more re-

<sup>1</sup> Year Books, xix. Henry VI, cited Gneist, *op. cit.*, vol. i, p. 455.

<sup>2</sup> Many of de Tocqueville's remarks were not applicable to the Switzerland of 1908 ; they refer to a period before the creation in 1848 of the Swiss Federal Constitution ; and see App. sec. iv for a revision of the author's note on the Swiss Constitution.—Ed.



“publican than the Helvetic Republic. The principal differences are found in the institutions of the two countries, and especially in their customs (*mœurs*).

“1. In almost all the Swiss Cantons liberty of the press is a very recent thing.

“2. In almost all of them individual liberty is by no means completely guaranteed, and a man may be arrested administratively and detained in prison without much formality.

“3. The courts have not, generally speaking, a perfectly independent position.

“4. In all the Cantons trial by jury is unknown.

“5. In several Cantons the people were thirty-eight years ago entirely without political rights. Aargau, Thurgau, Tessin, Vaud, and parts of the Cantons of Zurich and Berne were in this condition.

“The preceding observations apply even more strongly to customs than to institutions.

“i. In many of the Swiss Cantons the majority of the citizens are quite without taste or desire for *self-government*, and have not acquired the habit of it. In any crisis they interest themselves about their affairs, but you never see in them the thirst for political rights and the craving to take part in public affairs which seem to torment Englishmen throughout their lives.

“ii. The Swiss abuse the liberty of the press on account of its being a recent form of liberty, and Swiss newspapers are much more *revolutionary* and much less *practical* than English newspapers.

“iii. The Swiss seem still to look upon associations from much the same point of view as the French, that is to say, they consider them as a

Part II. " means of revolution, and not as a slow and sure  
" method for obtaining redress of wrongs. The art of  
" associating and of making use of the right of asso-  
" ciation is but little understood in Switzerland.

" iv. The Swiss do not show the love of justice  
" which is such a strong characteristic of the English.  
" Their courts have no place in the political arrange-  
" ments of the country, and exert no influence on  
" public opinion. The love of justice, the peaceful  
" and legal introduction of the judge into the domain  
" of politics, are perhaps the most standing character-  
" istics of a free people.

" v. Finally, and this really embraces all the rest,  
" the Swiss do not show at bottom that respect for  
" justice, that love of law, that dislike of using force,  
" without which no free nation can exist, which strikes  
" strangers so forcibly in England.

" I sum up these impressions in a few words.

" Whoever travels in the United States is involun-  
" tarily and instinctively so impressed with the fact  
" that the spirit of liberty and the taste for it have  
" pervaded all the habits of the American people, that  
" he cannot conceive of them under any but a Repub-  
" lican government. In the same way it is impossible  
" to think of the English as living under any but a  
" free government. But if violence were to destroy the  
" Republican institutions in most of the Swiss Cantons,  
" it would be by no means certain that after rather a  
" short state of transition the people would not grow  
" accustomed to the loss of liberty. In the United  
" States and in England there seems to be more liberty  
" in the customs than in the laws of the people. In  
" Switzerland there seems to be more liberty in the

“ laws than in the customs of the country.”<sup>1</sup>

Chapter  
IV.

de Tocqueville's language has a twofold bearing on our present topic. His words point in the clearest manner to the rule, predominance, or supremacy of law as the distinguishing characteristic of English institutions. They further direct attention to the extreme vagueness of a trait of national character which is as noticeable as it is hard to portray. de Tocqueville, we see, is clearly perplexed how to define a feature of English manners of which he at once recognises the existence ; he mingles or confuses together the habit of self-government, the love of order, the respect for justice and a legal turn of mind. All these sentiments are intimately allied, but they cannot without confusion be identified with each other. If, however, a critic as acute as de Tocqueville found a difficulty in describing one of the most marked peculiarities of English life, we may safely conclude that we ourselves, whenever we talk of Englishmen as loving the government of law, or of the supremacy of law as being a characteristic of the English constitution, are using words which, though they possess a real significance, are nevertheless to most persons who employ them full of vagueness and ambiguity. If therefore we are ever to appreciate the full import of the idea denoted by the term “ rule, supremacy, or predominance of law,” we must first determine precisely what we mean by such expressions when we apply them to the British constitution.

Bearing of  
de Tocque-  
ville's re-  
marks on  
meaning of  
rule of law.

When we say that the supremacy or the rule of law is a characteristic of the English constitution, we

Three  
meanings  
of rule of  
law.

<sup>1</sup> See de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. viii (Mélanges historiques), pp. 455-457.

Part II. generally include under one expression at least three distinct though kindred conceptions.

Absence of  
arbitrary  
power on  
part of the  
govern-  
ment.

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

Contrast  
between  
England  
and the  
Continent  
at present  
day.

Modern Englishmen may at first feel some surprise that the "rule of law" (in the sense in which we are now using the term) should be considered as in any way a peculiarity of English institutions, since, at the present day, it may seem to be not so much the property of any one nation as a trait common to every civilised and orderly state. Yet, even if we confine our observation to the existing condition of Europe, we shall soon be convinced that the "rule of law" even in this narrow sense is peculiar to England, or to those countries which, like the United States of America, have inherited English traditions. In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the government in England; and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.

If, however, we confined our observation to the Europe of to-day (1908), we might well say that in most European countries the rule of law is now nearly as well established as in England, and that private individuals at any rate who do not meddle in politics have little to fear, as long as they keep the law, either from the Government or from any one else; and we might therefore feel some difficulty in understanding how it ever happened that to foreigners the absence of arbitrary power on the part of the Crown, of the executive, and of every other authority in England, has always seemed a striking feature, we might almost say the essential characteristic, of the English constitution.<sup>1</sup>

Contrast  
between  
England  
and Conti-  
nent during  
eighteenth  
century.

Our perplexity is entirely removed by carrying back our minds to the time when the English constitution began to be criticised and admired by foreign thinkers. During the eighteenth century many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power. The singularity of England was not so much the goodness or the leniency as the legality of the English system of government. When Voltaire came to England—and Voltaire represented the feeling of his age—his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by

<sup>1</sup> "La liberté est le droit de faire tout ce que les lois permettent; et si un citoyen pouvoit faire ce qu'elles défendent, il n'auroit plus de liberté, parce que les autres auroient tout de même ce pouvoir."—Montesquieu, *De l'esprit des lois* (1845), bk. xi, ch. iii.

"Il y a aussi une nation dans le monde qui a pour objet direct de sa constitution la liberté politique."—*Ibid.* ch. v. The English are this nation.



Part II. caprice.<sup>1</sup> He had good reason to know the difference. In 1717 Voltaire was sent to the Bastille for a poem which he had not written, of which he did not know the author, and with the sentiment of which he did not agree. What adds to the oddity, in English eyes, of the whole transaction is that the Regent treated the affair as a sort of joke, and, so to speak, "chaffed" the supposed author of the satire "*I have seen*" on being about to pay a visit to a prison which he "had not seen."<sup>2</sup> In 1725 Voltaire, then the literary hero of his country, was lured off from the table of a Duke, and was thrashed by lackeys in the presence of their noble master; he was unable to obtain either legal or honourable redress, and because he complained of this outrage, paid a second visit to the Bastille. This indeed was the last time in which he was lodged within the walls of a French gaol, but his whole life was a series of contests with arbitrary power, and nothing but his fame, his deftness, his infinite resource, and ultimately his wealth, saved him from penalties far more severe than temporary imprisonment. Moreover, the price at which Voltaire saved his property and his life was after all exile from France. Whoever wants to see how exceptional a phenomenon was that supremacy of law which existed in England during

<sup>1</sup> "Les circonstances qui contraignaient Voltaire à chercher un refuge chez nos voisins devaient lui inspirer une grande sympathie pour des institutions où il n'y avait nulle place à l'arbitraire. 'La raison est libre ici et n'y connaît point de contrainte.' On y respire un air plus généreux, l'on se sent au milieu de citoyens qui n'ont pas tort de porter le front haut, de marcher fièrement, sûrs qu'on n'eût pu toucher à un seul cheveu de leur tête, et n'ayant à redoubter ni lettres de cachet, ni captivité immotivée."—Desnoïesterres, *Voltaire et la Société au XVIII<sup>ème</sup> Siècle* (2nd ed., vol. i, 1871), p. 365.

<sup>2</sup> Desnoïesterres, *Voltaire et la Société au XVIII<sup>ème</sup> Siècle* (2nd ed., vol. i), pp. 344-364.

the eighteenth century should read such a book as Morley's *Life of Diderot*. The effort lasting for twenty-two years to get the *Encyclopédie* published was a struggle on the part of all the distinguished literary men in France to obtain utterance for their thoughts. It is hard to say whether the difficulties or the success of the contest bear the strongest witness to the wayward arbitrariness of the French Government.

Royal lawlessness was not peculiar to specially detestable monarchs such as Louis the Fifteenth: it was inherent in the French system of administration. An idea prevails that Louis the Sixteenth at least was not an arbitrary, as he assuredly was not a cruel ruler. But it is an error to suppose that up to 1789 anything like the supremacy of law existed under the French monarchy. The folly, the grievances, and the mystery of the Chevalier D'Eon made as much noise little more than a century ago as the imposture of the Claimant in our own day. The memory of these things is not in itself worth reviving. What does deserve to be kept in remembrance is that in 1778, in the days of Johnson, of Adam Smith, of Gibbon, of Cowper, of Burke, and of Mansfield, during the continuance of the American war and within eleven years of the assembling of the States General, a brave officer and a distinguished diplomatist could for some offence still unknown, without trial and without conviction, be condemned to undergo a penance and disgrace which could hardly be rivalled by the fanciful caprice of the torments inflicted by Oriental despotism.<sup>1</sup>

<sup>1</sup> It is worth notice that even after the meeting of the States General the King was apparently reluctant to give up altogether the powers exercised by *lettres de cachet*. See "Déclaration des intentions du Roi," art. 15, Plouard, *Les Constitutions françaises* (1871-1876), p. 10.

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Part II.

Nor let it be imagined that during the latter part of the eighteenth century the government of France was more arbitrary than that of other countries. To entertain such a supposition is to misconceive utterly the condition of the continent. In France, law and public opinion counted for a great deal more than in Spain, in the petty States of Italy, or in the Principalities of Germany. All the evils of despotism which attracted the notice of the world in a great kingdom such as France existed under worse forms in countries where, just because the evil was so much greater, it attracted the less attention. The power of the French monarch was criticised more severely than the lawlessness of a score of petty tyrants, not because the French King ruled more despotically than other crowned heads, but because the French people appeared from the eminence of the nation to have a special claim to freedom, and because the ancient kingdom of France was the typical representative of despotism. This explains the thrill of enthusiasm with which all Europe greeted the fall of the Bastille. When the fortress was taken, there were not ten prisoners within its walls; at that very moment hundreds of debtors languished in English gaols. Yet all England hailed the triumph of the French populace with a fervour which to Englishmen of the twentieth century is at first sight hardly comprehensible. Reflection makes clear enough the cause of a feeling which spread through the length and breadth of the civilised world. The Bastille was the outward and visible sign of lawless power. Its fall was felt, and felt truly, to herald in for the rest

of Europe that rule of law which already existed in England.<sup>1</sup>

Chapter  
IV.

We mean in the second place,<sup>2</sup> when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Every man  
subject to  
ordinary  
law admini-  
stered by  
ordinary  
tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor,<sup>3</sup> a secretary of state,<sup>4</sup> a military

<sup>1</sup> For English sentiment with reference to the servitude of the French, see Goldsmith, *The Citizen of the World*, Letter iv; and see *ibid.*, Letter xxxviii, for a contrast between the execution of Lord Ferrers and the impunity with which a French nobleman was allowed to commit murder because of his relationship to the Royal family; and for the general state of feeling throughout Europe, de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. viii (Mélanges historiques), pp. 57-72. The idea of the rule of law in this sense implies, or is at any rate closely connected with, the absence of any dispensing power on the part either of the Crown or its servants. See Bill of Rights, Preamble 1 (Stubbs, *Select Charters* (8th ed., 1900), p. 523; cf. *Miller v. Knox* (1833) 6 Scott, 1; *Attorney-General v. Kissane* (1893) 32 L.R. Ir. 220.

<sup>2</sup> For first meaning see p. 188, *ante*.

<sup>3</sup> *Mostyn v. Fabrigas* (1774) 1 Cowp. 161; *Musgrave v. Pulido* (1879) 5 App. Cas. 102; K. & L. 462; *Governor Wall's Case* (1802) 28 St. Tr. 51.

<sup>4</sup> *Entick v. Carrington* (1765) 19 St. Tr. 1030; K. & L. 145.

Part II. officer,<sup>1</sup> and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.<sup>2</sup> Officials, such for example as soldiers<sup>3</sup> or clergyman of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow-countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.

Contrast in  
this respect  
between  
England  
and France.

An Englishman naturally imagines that the rule of law (in the sense in which we are now using the term) is a trait common to all civilised societies. But this supposition is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priests, and others could defy the law. But it is even now far from universally true that in continental countries all persons are subject to one and the same law, or that the courts are supreme throughout the state. If we take

<sup>1</sup> *Phillips v. Eyre* (1867) L.R. 4 Q.B. 225; K. & L. 431.

<sup>2</sup> See p. 489, *post*.

<sup>3</sup> As to the legal position of soldiers, see ch. viii and ix, and App. sec. v, *post*.



France as the type of a continental state, we may assert, with substantial accuracy, that officials—under which word should be included all persons employed in the service of the state—are, or have been,<sup>1</sup> in their official capacity, to some extent exempted from the ordinary law of the land, protected from the jurisdiction of the ordinary tribunals, and subject in certain respects only to official law administered by official bodies.<sup>2</sup>

General rules of constitutional law are result of ordinary law of the land.

There remains yet a third and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts ;<sup>3</sup> whereas under many foreign constitutions the security (such

<sup>1</sup> *The Law and the Constitution* (2nd ed., 1938); see pp. 210 *et seq.* Dr. Jennings points out that the words "or have been," did not appear in earlier editions. This is equally true of the qualification "to some extent." Cf. 6th ed., p. 190, with 7th ed., p. 190.—Ed.

<sup>2</sup> See ch. xii as to the contrast between the rule of law and foreign administrative law, but see App. sec. i, (2) and (4), and Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 207 *et seq.*

<sup>3</sup> Cf. *Calvin's Case* (1608) 7 Co. Rep. 1a; *Campbell v. Hall* (1774) Lofft. 655; J. & Y. 39; *Wilkes v. Wood* (1763) 19 St. Tr. 1153; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161. Parliamentary declarations of the law such as the Petition of Right and the Bill of Rights have a certain affinity to judicial decisions. [Cf. Jennings, *op. cit.*, pp. 38-40, where the point is made that this aspect of the rule of law is only true of principles for the protection of private rights. It is untrue of the principles of the supremacy of Parliament and of the independence of the judges. The latter is statutory; the former rests upon no judicial decision.—Ed.]

Part II. as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

This is one portion at least of the fact vaguely hinted at in the current but misleading statement that "the constitution has not been made but has "grown." This dictum, if taken literally, is absurd. "Political institutions (however the proposition may "be at times ignored) are the work of men, owe their "origin and their whole existence to human will. "Men did not wake up on a summer morning and "find them sprung up. Neither do they resemble "trees, which, once planted, are 'aye growing' while "men 'are sleeping.' In every stage of their existence "they are made what they are by human voluntary "agency."<sup>1</sup>

Yet, though this is so, the dogma that the form of a government is a sort of spontaneous growth so closely bound up with the life of a people that we can hardly treat it as a product of human will and energy, does, though in a loose and inaccurate fashion, bring into view the fact that some polities, and among them the English constitution, have not been created at one stroke, and, far from being the result of legislation, in the ordinary sense of that term, are the fruit of contests carried on in the courts on behalf of the rights of individuals. Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law.

Hence flow noteworthy distinctions between the constitution of England and the constitutions of most foreign countries.

<sup>1</sup> Mill, *Considerations on Representative Government* (3rd ed., 1865), p. 4.

There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament. To put what is really the same thing in a somewhat different shape, the relation of the rights of individuals to the principles of the constitution is not quite the same in countries like Belgium, where the constitution is the result of a legislative act, as it is in England, where the constitution itself is based upon legal decisions. In Belgium, which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation, you may say with truth that the rights of individuals to personal liberty flow from or are secured by the constitution. In England the right to individual liberty is part of the constitution, because it is secured by the decisions of the courts, extended or confirmed as they are by the Habeas Corpus Acts. If it be allowable to apply the formulas of logic to questions of law, the difference in this matter between the constitution of Belgium and the English constitution may be described by the statement that in Belgium individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to

Part II. the rights of given individuals.

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This is of course a merely formal difference. Liberty is as well secured in Belgium as in England, and as long as this is so it matters nothing whether we say that individuals are free from all risk of arbitrary arrest, because liberty of person is guaranteed by the constitution, or that the right to personal freedom, or in other words to protection from arbitrary arrest, forms part of the constitution because it is secured by the ordinary law of the land. But though this merely formal distinction is in itself of no moment, provided always that the rights of individuals are really secure, the question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured. Now, most foreign constitution-makers have begun with declarations of rights. For this they have often been in nowise to blame. Their course of action has more often than not been forced upon them by the stress of circumstances, and by the consideration that to lay down general principles of law is the proper and natural function of legislators. But any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced. The Constitution of 1791 proclaimed liberty of conscience, liberty of the

press, the right of public meeting, the responsibility of government officials.<sup>1</sup> But there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might almost say so completely non-existent, as at the height of the French Revolution. And an observer may well doubt whether a good number of these liberties or rights are even now so well protected under the French Republic as under the English Monarchy. On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation. The saw, *ubi jus ibi remedium*, becomes from this point of view something much more important than a mere tautologous proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon any declaration of the Rights of Man or of Englishmen. The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty. Nor let it be supposed that this connection between rights and remedies which depends upon the spirit of law pervading English

<sup>1</sup> See Plouard, *Les Constitutions françaises* (1871-1876), pp. 14-16; Duguít et Monnier, *Les Constitutions et les principales lois politiques de la France depuis 1789* (1898), pp. 4, 5.



Part II. institutions is inconsistent with the existence of a written constitution, or even with the existence of constitutional declarations of rights. The Constitution of the United States and the constitutions of the separate States are embodied in written or printed documents, and contain declarations of rights.<sup>1</sup> But the statesmen of America have shown unrivalled skill in providing means for giving legal security to the rights declared by American constitutions. The rule of law is as marked a feature of the United States as of England.

The fact, again, that in many foreign countries the rights of individuals, *e.g.* to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the courts secure to individuals, has this important result. The general rights guaranteed by the constitution may be, and in foreign countries

<sup>1</sup> The Petition of Right, and the Bill of Rights, as also the American Declarations of Rights, contain, it may be said, proclamations of general principles which resemble the declarations of rights known to foreign constitutionalists, and especially the celebrated Declaration of the Rights of Man of 1789. But the English and American Declarations on the one hand, and foreign declarations of rights on the other, though bearing an apparent resemblance to each other, are at bottom remarkable rather by way of contrast than of similarity. The Petition of Right and the Bill of Rights are not so much "declarations of rights" in the foreign sense of the term, as judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal. It will be found that every, or nearly every, clause in the two celebrated documents negatives some distinct claim made and put into force on behalf of the prerogative. No doubt the Declarations contained in the American constitutions have a real similarity to the continental declarations of rights. They are the product of eighteenth-century ideas; they have, however, it is submitted, the distinct purpose of legally controlling the action of the legislature by the Articles of the Constitution. See p. 484 for Bill of Rights and Act of Settlement.

constantly are, suspended. They are something extraneous to and independent of the ordinary course of the law. The declaration of the Belgian constitution, that individual liberty is "guaranteed," betrays a way of looking at the rights of individuals very different from the way in which such rights are regarded by English lawyers. We can hardly say that one right is more guaranteed than another. Freedom from arbitrary arrest, the right to express one's opinion on all matters subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements, and the right to enjoy one's own property, seem to Englishmen all to rest upon the same basis, namely, on the law of the land. To say that the "constitution guaranteed" one class of rights more than the other would be to an Englishman an unnatural or a senseless form of speech. In the Belgian constitution the words have a definite meaning. They imply that no law invading personal freedom can be passed without a modification of the constitution made in the special way in which alone the constitution can be legally changed or amended. This, however, is not the point to which our immediate attention should be directed. The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. . Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation. The so-called

Part II. "suspension of the Habeas Corpus Act" bears, it is true, a certain similarity to what is called in foreign countries "suspending the constitutional guarantees." But, after all, a statute suspending the Habeas Corpus Act falls very far short of what its popular name seems to imply; and though a serious measure enough, is not, in reality, more than a suspension of one particular remedy for the protection of personal freedom.<sup>1</sup> The Habeas Corpus Act may be suspended and yet Englishmen may enjoy almost all the rights of citizens. The constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.

Summary  
of mean-  
ings of  
Rule of  
Law

That "rule of law," then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts;

<sup>1</sup> See App. sec. i (6) (A), p. 521, for a reference to the Defence of the Realm Acts, 1914-15.

the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (*droit administratif*) or the "administrative tribunals" (*tribunaux administratifs*) of France.<sup>1</sup> The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

General propositions, however, as to the nature of the rule of law carry us but a very little way. If we want to understand what that principle in all its different aspects and developments really means, we

Influence  
of "Rule  
of Law"  
on leading  
provisions  
of constitu-  
tion.

<sup>1</sup> See ch. xii and cf. Intro. pp. lxxv-xcv, *ante*, and Jennings, *The Law and the Constitution* (2nd ed., 1938), App. ii.

Part II. must try to trace its influence throughout some of the main provisions of the constitution. The best mode of doing this is to examine with care the manner in which the law of England deals with the following topics, which are dealt with in succeeding chapters, namely, the right to personal freedom; the right to freedom of discussion; the right of public meeting; the use of martial law; the rights and duties of the army; the collection and expenditure of the public revenue; and the responsibility of Ministers. The true nature further of the rule of law as it exists in England will be illustrated by contrast with the idea of *droit administratif*, or administrative law, which prevails in many continental countries. These topics will each be treated of in their due order. The object, however, of this treatise, as the reader should remember, is not to provide minute and full information, *e.g.* as to the habeas corpus Acts, or other enactments protecting the liberty of the subject; but simply to show that these leading heads of constitutional law, which have been enumerated, these "articles," so to speak, of the constitution, are both governed by, and afford illustrations of, the supremacy throughout English institutions of the law of the land.<sup>1</sup> If at some future day the law of the constitution should be codified, each

<sup>1</sup> The rule of equal law is in England now exposed to a new peril. "The Legislature has thought fit," wrote Sir F. Pollock, "by the Trade Disputes Act, 1906, to confer extraordinary immunities on combinations both of employers and of workmen, and to some extent on persons acting in their interests. Legal science has evidently nothing to do with this violent empirical operation on the body politic, and we can only look to jurisdictions beyond seas for the further judicial consideration of the problems which our courts were endeavouring (it is submitted, not without a reasonable measure of success) to work out on principles of legal justice."—Pollock, *Law of Torts* (8th ed., 1908), p. v.



of the topics I have mentioned would be dealt with by the sections of the code. Many of these subjects are actually dealt with in the written constitutions of foreign countries, and notably in the articles of the Belgian constitution, which, as before noticed, makes an admirable summary of the leading maxims of English constitutionalism. It will therefore often be a convenient method of illustrating our topic to take the article of the Belgian, or it may be of some other constitution, which bears on the matter in hand, as for example the right to personal freedom, and to consider how far the principle therein embodied is recognised by the law of England; and if it be so recognised, what are the means by which it is maintained or enforced by our courts. One reason why the law of the constitution is imperfectly understood is, that we too rarely put it side by side with the constitutional provisions of other countries. Here, as elsewhere, comparison is essential to recognition.

## CHAPTER V

### THE RIGHT TO PERSONAL FREEDOM

Part II. THE seventh article of the Belgian constitution establishes in that country principles which have long prevailed in England. The terms thereof so curiously illustrate by way of contrast some marked features of English constitutional law as to be worth quotation.

Security  
for per-  
sonal free-  
dom under  
Belgian  
constitu-  
tion.

*"Art. 7. La liberté individuelle est garantie.*

*"Nul ne peut être poursuivi que dans les cas  
"prévus par la loi, et dans la forme qu'elle prescrit.*

*"Hors le cas de flagrant délit, nul ne peut être  
"arrêté qu'en vertu de l'ordonnance motivée du juge,  
"qui doit être signifiée au moment de l'arrestation, ou  
"au plus tard dans les vingt-quatre heures."*<sup>1</sup>

How  
secured in  
England.

The security which an Englishman enjoys for personal freedom does not really depend upon or originate in any general proposition contained in any written document. The nearest approach which our statute-book presents to the statement contained in the seventh article of the Belgian constitution is the celebrated thirty-ninth article<sup>2</sup> of the Magna Charta:

<sup>1</sup> *Constitution de la Belgique*, art. 7.

<sup>2</sup> See Stubbs, *Select Charters* (8th ed., 1900), p. 301.

*"Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae,"* which should be read in combination with the declarations of the Petition of Right. And these enactments (if such they can be called) are rather records of the existence of a right than statutes which confer it. The expression again, "guaranteed," is, as I have already pointed out, extremely significant; it suggests the notion that personal liberty is a special privilege insured to Belgians by some power above the ordinary law of the land. This is an idea utterly alien to English modes of thought, since with us freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the courts.<sup>1</sup> Here, in short, we may observe the application to a particular case of the general principle that with us individual rights are the basis, not the result, of the law of the constitution.

The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence, and students who wish to know how far the right to freedom of person is in reality part of the law of the constitution must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured.

The right to personal liberty as understood in

<sup>1</sup> The Star Chamber Abolition Act, 1641, guaranteed to the subject that the writ of habeas corpus lay against the King and the Council.

Part II. England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.<sup>1</sup> That anybody should suffer physical restraint is in England *prima facie* illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, *i.e.* (speaking again in very general terms indeed) under some legal warrant or authority, and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle. These methods are twofold;<sup>2</sup> namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of habeas corpus. Let us examine the general character of each of these remedies.

i. *Redress for Arrest*.—If we use the term redress in a wide sense, we may say that a person who has suffered a wrong obtains redress either when he gets

<sup>1</sup> For legal justification see Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 355 and 383; Kenny, *Outlines of Criminal Law* (15th ed., G. G. Phillips, 1936), pp. 525-531.—Ed.

<sup>2</sup> The author added in a footnote a third, namely, self-defence, or the assertion of legal rights by the use of a person's own force.—Ed.

the wrongdoer punished or when he obtains compensation for the damage inflicted upon him by the wrong.

Each of these forms of redress is in England open to every one whose personal freedom has been in any way unlawfully interfered with. Suppose, for example, that *X* without legal justification assaults *A*, by knocking him down, or deprives *A* of his freedom—as the technical expression goes, “imprisons” him—whether it be for a length of time, or only for five minutes; *A* has two courses open to him. He can have *X* convicted of an assault and thus cause him to be punished for his crime, or he can bring an action of trespass against *X* and obtain from *X* such compensation for the damage which *A* has sustained from *X*’s conduct as a jury think that *A* deserves. Suppose that in 1725 Voltaire had at the instigation of an English lord been treated in London as he was treated in Paris. He would not have needed to depend for redress upon the goodwill of his friends or upon the favour of the Ministry. He could have pursued one of two courses.<sup>1</sup> He could by taking the proper steps have caused all his assailants to be brought to trial as criminals. He could, if he had preferred it, have brought an action against each and all of them: he could have sued the nobleman who caused him to be thrashed, the footmen who thrashed him, the policemen who threw him into gaol, and the gaoler or lieutenant who kept him there. Notice particularly that the action for trespass, to which Voltaire would have had recourse, can be brought,

<sup>1</sup> The Crown could have granted a free pardon or have entered a *nolle prosequi*, i.e. declined to proceed with the prosecution. It could not have interfered with the civil actions.—ED.



Part II. or, as the technical expression goes, "lies," against every person throughout the realm. It can and has been brought against governors of colonies, against secretaries of state, against officers who have tried by court-martial persons not subject to military law, against every kind of official high or low. Here then we come across another aspect of the "rule of law." No one of Voltaire's enemies would, if he had been injured in England, have been able to escape from responsibility on the plea of acting in an official character or in obedience to his official superiors.<sup>1</sup> Nor would any one of them have been able to say that the degree of his guilt could in any way whatever be determined by any more or less official court. Voltaire, to keep to our example, would have been able in England to have brought each and all of his assailants, including the officials who kept him in prison, before an ordinary court, and therefore before judges and jurymen who were not at all likely to think that official zeal or the orders of official superiors were either a legal or a moral excuse for breaking the law.

Before quitting the subject of the redress afforded by the courts for the damage caused by illegal interference with any one's personal freedom, we shall do well to notice the strict adherence of the judges in this as in other cases to two maxims or principles which underlie the whole law of the constitution, and the maintenance of which has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown. The first of these maxims or principles is that every wrongdoer is individually responsible for every unlaw-

<sup>1</sup> Contrast the French *Code Pénal*, art. 114.

ful or wrongful act in which he takes part, and, what is really the same thing looked at from another point of view, cannot, if the act be unlawful, plead in his defence that he did it under the orders of a master or superior. Voltaire, had he been arrested in England, could have treated each and all of the persons engaged in the outrage as individually responsible for the wrong done to him. Now this doctrine of individual responsibility is the real foundation of the legal dogma that the orders of the King himself are no justification for the commission of a wrongful or illegal act. The ordinary rule, therefore, that every wrongdoer is individually liable for the wrong he has committed, is the foundation on which rests the great constitutional doctrine of Ministerial responsibility. The second of these noteworthy maxims is, that the courts give a remedy for the infringement of a right whether the injury done be great or small. The assaults and imprisonment from which Voltaire suffered were serious wrongs; but it would be an error to fancy, as persons who have no experience in the practice of the courts are apt to do, that proceedings for trespass or for false imprisonment can be taken only where personal liberty is seriously interfered with. Ninety-nine out of every hundred actions for assault or false imprisonment have reference to injuries which in themselves are trifling. If one ruffian gives another a blow, if a policeman makes an arrest without lawful authority, if a schoolmaster keeps a scholar locked up at school for half an hour after he ought to have let the child go home,<sup>1</sup> if in short X interferes unlawfully to however slight a

<sup>1</sup> *Hunter v. Johnson* (1884) 13 Q.B.D. 225.

Part II. degree with the personal liberty of *A*, the offender exposes himself to proceedings in a court of law, and the sufferer, if he can enlist the sympathies of a jury, may recover heavy damages for the injury which he has or is supposed to have suffered. The law of England protects the right to personal liberty, as also every other legal right, against every kind of infringement, and gives the same kind of redress (I do not mean, of course, inflicts the same degree of punishment or penalty) for the pettiest as for the gravest invasions of personal freedom. This seems to us so much a matter of course as hardly to call for observation, but it may be suspected that few features in our legal system have done more to maintain the authority of the law than the fact that all offences great and small are dealt with on the same principles and by the same courts. The law of England now knows nothing of exceptional offences punished by extraordinary tribunals.<sup>1</sup>

The right of a person who has been wrongfully imprisoned on regaining his freedom to put his oppressor on trial as a criminal, or by means of an action to obtain pecuniary compensation for the wrong which he has endured, affords a most insufficient security for personal freedom. If *X* keeps *A* in confinement, it profits *A* little to know that if he could recover his freedom, which he cannot, he could punish and fine *X*. What *A* wants is to recover his liberty. Till this is done he cannot hope to punish the foe who has deprived him of it. It would have

<sup>1</sup> Contrast with this the extraordinary remedies adopted under the old French monarchy for the punishment of powerful criminals. As to which see Fléchier, *Mémoires de Fléchier sur les grands jours d'Auvergne, en 1665* (1856).

been little consolation for Voltaire to know that if he could have got out of the Bastille he could recover damages from his enemies. The possibility that he might when he got free have obtained redress for the wrong done him might, so far from being a benefit, have condemned him to lifelong incarceration. Liberty is not secure unless the law, in addition to punishing every kind of interference with a man's lawful freedom, provides adequate security that every one who without legal justification is placed in confinement shall be able to get free. This security is provided by the celebrated writ of habeas corpus and the Habeas Corpus Acts.

ii. *Writ of Habeas Corpus*.<sup>1</sup>—It is not within the scope of these lectures to give a history of the writ of habeas corpus or to provide the details of the legislation with regard to it. For minute information, both about the writ and about the Habeas Corpus Acts, you should consult the ordinary legal text-books. My object is solely to explain generally the mode in which the law of England secures the right to personal freedom. I shall therefore call attention to the following points: first, the nature of the writ; secondly, the effect of the so-called Habeas Corpus Acts; thirdly, the precise effect of what is called (not quite accurately) the Suspension of the Habeas Corpus Act; and, lastly, the relation of any Act suspending the operation of the Habeas Corpus Act to an Act of Indemnity. Each of these matters has a close bearing on the law of the constitution.

Writ of  
habeas  
corpus.

<sup>1</sup> See Star Chamber Abolition Act, 1641, s. 8; Habeas Corpus Acts, 1679, 1816, and 1862; Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 359-366; Forsyth, *Cases and Opinions in Constitutional Law* (1869), ch. xvi.

## Part II.

Nature of  
Writ.

*Nature of Writ.*—Legal documents constantly give the best explanation and illustration of legal principles. We shall do well therefore to examine with care the following copy of a writ of habeas corpus :—

*"Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith,*

*"To J. K., Keeper of our Gaol of Jersey, in the Island of Jersey, and to J. C. Viscount of said Island, greeting. We command you that you have the body of C. C. W. detained in our prison under your custody, as it is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, in our Court before us, at Westminster, on the 18th day of January next, to undergo and receive all and singular such matters and things which our said Court shall then and there consider of him in this behalf; and have there then this Writ. Witness THOMAS Lord DENMAN, at Westminster, the 23rd day of December in the 8th year of our reign.*

*"By the Court,*

*"Robinson."¹*

*"At the instance of C. C. W.*

*"R. M. R."*

*"W. A. L., 7 Gray's Inn Square, London,*

*"Attorney for the said C. C. W."*

The character of the document is patent on its

¹ *Carus Wilson's Case* (1845) 7 Q.B. 984, at p. 988. In this particular case the writ calls upon the gaoler of the prison to have the body of the prisoner before the court by a given day. It more ordinarily calls upon him to have the prisoner before the court "immediately after the receipt of this writ."



face. It is an order issued, in the particular instance, by the Court of Queen's Bench, calling upon a person by whom a prisoner is alleged to be kept in confinement to bring such prisoner—to "have his body" whence the name *habeas corpus*—before the court to let the court know on what ground the prisoner is confined, and thus give to the court the opportunity of dealing with the prisoner as the law may require. The essence of the whole transaction is that the court can by the writ of *habeas corpus* cause any person who is imprisoned to be actually brought before the court and obtain knowledge of the reason why he is imprisoned; and then having him before the court, either then and there set him free or else see that he is dealt with in whatever way the law requires, as, for example, brought speedily to trial.

The writ can be issued on the application either of the prisoner himself or of any person on his behalf, or (supposing the prisoner cannot act) then on the application of any person who believes him to be unlawfully imprisoned. It is issued by the High Court, or during vacation by any judge thereof; and the court or a judge should and will always cause it to be issued on being satisfied by affidavit that there is reason to suppose a prisoner to be wrongfully deprived of his liberty. You cannot say with strictness that the writ is issued "as a matter of course," for some ground must be shown for supposing that a case of illegal imprisonment exists. But the writ is granted "as a matter of right,"—that is to say, the court will always issue it if *prima facie* ground is shown for supposing that the person on whose behalf it is asked for is unlawfully deprived of his liberty.

**Part II.** The writ or order of the court can be addressed to any person whatever, be he an official or a private individual, who has, or is supposed to have, another in his custody. Any disobedience to the writ exposes the offender to summary punishment for contempt of court,<sup>1</sup> and also in many cases to heavy penalties recoverable by the party aggrieved.<sup>2</sup> To put the matter, therefore, in the most general terms, the case stands thus. The High Court of Justice possesses, as the tribunals which make up the High Court used to possess, the power by means of the writ of habeas corpus to cause any person who is alleged to be kept in unlawful confinement to be brought before the court. The court can then inquire into the reason why he is confined, and can, should it see fit, set him then and there at liberty. This power moreover is one which the court always will exercise whenever ground is shown by any applicant whatever for the belief that any man in England is unlawfully deprived of his liberty.

*Habeas  
Corpus  
Acts.*

*The Habeas Corpus Acts.*—The right to the writ of habeas corpus existed at common law long before the passing in 1679 of the celebrated Habeas Corpus Act,<sup>3</sup> and you may wonder how it has happened that this and the Habeas Corpus Act, 1816, are treated, and (for practical purposes) rightly treated, as the basis on which rests an Englishman's security for the enjoyment of his personal freedom. The explana-

<sup>1</sup> *The King v. Winton* (1792) 5 T.R. 89; cf. Habeas Corpus Act, 1816, s. 2; see Corner, *Practice of the Crown Side of the Court of Queen's Bench* (1844).

<sup>2</sup> Habeas Corpus Act, 1679, s. 4.

<sup>3</sup> See also Star Chamber Abolition Act, 1641, s. 8.

tion is, that prior to 1679 the right to the writ was often under various pleas and excuses made of no effect. The aim of the Habeas Corpus Acts has been to meet all the devices by which the effect of the writ can be evaded, either on the part of the judges, who ought to issue the same, and if necessary discharge the prisoner, or on the part of the gaoler or other person who has the prisoner in custody. The earlier Act of Charles the Second applies to persons imprisoned on a charge of crime; the later Act of George the Third applies to persons deprived of their liberty otherwise than on a criminal accusation.

Take these two classes of persons separately.

A person is imprisoned on a charge of crime. If he is imprisoned without any legal warrant for his imprisonment, he has a right to be set at liberty. If, on the other hand, he is imprisoned under a legal warrant, the object of his detention is to ensure his being brought to trial. His position in this case differs according to the nature of the offence with which he is charged. In the case of the lighter offences known as misdemeanours he has, generally speaking,<sup>1</sup> the right to his liberty on giving security with proper sureties that he will in due course surrender himself to custody and appear and take his trial on such indictment as may be found against him in respect of the matter with which he is charged, or (to use technical expressions) he has the right to be admitted to bail. In the case, on the other hand, of the more serious offences, such as felonies or treasons,

*If Habeas  
Corpus Act,  
1679.*

<sup>1</sup> For Bail see Halsbury, *Laws of England* (2nd ed.), vol. ix (1933), pp. 118-121, and Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 364, 365.

Part II. a person who is once committed to prison is not entitled to be let out on bail. The right of the prisoner is in this case simply the right to a speedy trial. The effect of the writ of habeas corpus would be evaded either if the court did not examine into the validity of the warrant on which the prisoner was detained, and if the warrant were not valid release him, or if the court, on ascertaining that he was legally imprisoned, did not cause him according to circumstances either to go out on bail or to be speedily brought to trial.

The Act provides against all these possible failures of justice. The law as to persons imprisoned under accusations of crime stands through the combined effect of the rules of the common law and of the statute in substance as follows. The gaoler who has such person in custody is bound when called upon to have the prisoner before the court with the true cause of his commitment. If the cause is insufficient, the prisoner must of course be discharged; if the cause is sufficient, the prisoner, in case he is charged with a misdemeanour, can in general insist upon being bailed till trial; in case, on the other hand, the charge is one of treason or felony, he can insist upon being tried at the first sessions after his committal, or if he is not then tried, upon being bailed, unless the witnesses for the Crown cannot appear. If he is not tried at the second sessions after his commitment, he can insist upon his release without bail. The net result, therefore, appears to be that while the Habeas Corpus Act is in force no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail or else

of being brought to a speedy trial.

A person, again, who is detained in confinement but not on a charge of crime needs for his protection the means of readily obtaining a legal decision on the lawfulness of his confinement, and also of getting an immediate release if he has by law a right to his liberty. This is exactly what the writ of habeas corpus affords. Whenever any Englishman or foreigner is alleged to be wrongfully deprived of liberty, the court will issue the writ, have the person aggrieved brought before the court, and if he has a right to liberty set him free. Thus if a child is forcibly kept apart from his parents,<sup>1</sup> if a man is wrongfully kept in confinement as a lunatic, if a nun is alleged to be prevented from leaving her convent, —if, in short, any man, woman, or child is, or is asserted on apparently good grounds to be, deprived of liberty, the court will always issue a writ of habeas corpus to any one who has the aggrieved person in his custody to have such person brought before the court, and if he is suffering restraint without lawful cause, set him free. Till, however, the year 1816 the machinery for obtaining the writ was less perfect<sup>2</sup> in the case of persons not accused of crime

Chapter  
V.

Habeas  
Corpus  
Act, 1816.

<sup>1</sup> See *The Queen v. Nash* (1883) 10 Q.B.D. 454; and cf. *Re Agar-Ellis* (1883) 24 Ch.D. 317; *Barnardo v. Ford* [1892] A.C. 326; *Barnardo v. McHugh* [1891] A.C. 388; *The Queen v. Jackson* [1891] 1 Q.B. 671; *Cox v. Hakes* (1890) 15 App. Cas. 506; compare as to power of Court of Chancery for protection of children independently of Habeas Corpus Acts, *The Queen v. Gynall* [1893] 2 Q.B. 232.

As to appeals to the Judicial Committee of the Privy Council, see *Eshugbayi Eleko v. Government of Nigeria* [1928] A.C. 459; and to the Court of Appeal, but not in a criminal cause, see *Ex parte Woodhall* (1888) 20 Q.B.D. 832; *In re Carroll* [1931] 1 K.B. 104.

<sup>2</sup> The inconvenience ultimately remedied by the Habeas Corpus Act, 1816, was in practice small, for the judges extended to all cases



Part II. than in the case of those charged with criminal offences, and the effect of the Act of 1816 was in substance to apply to non-criminal cases the machinery of the great Habeas Corpus Act, 1679.

At the present day, therefore, the securities for personal freedom are in England as complete as laws can make them. The right to its enjoyment is absolutely acknowledged. Any invasion of the right entails either imprisonment or fine upon the wrongdoer; and any person, whether charged with crime or not, who is even suspected to be wrongfully imprisoned, has, if there exists a single individual willing to exert himself on the victim's behalf, the certainty of having his case duly investigated, and, if he has been wronged, of recovering his freedom. Let us return for a moment to a former illustration, and suppose that Voltaire has been treated in London as he was treated in Paris. He most certainly would very rapidly have recovered his freedom. The procedure would not, it is true, have been in 1726 quite as easy as it is now under the Act of George the Third. Still, even then it would have been within the power of any one of his friends to put the law in motion. It would have been at least as easy to release Voltaire in 1726 as it was in 1772 to obtain by means of habeas corpus the freedom of the slave James Sommersett when actually confined in irons on board a ship lying in the Thames and bound for Jamaica.<sup>1</sup>

The whole history of the writ of habeas corpus of unlawful imprisonment the spirit of the Habeas Corpus Act, 1679, and enforced immediate obedience to the writ of habeas corpus, even when issued not under the statute, but under the common law authority of the courts, 3 Bl., *Comm.* 138.

<sup>1</sup> *Sommersett's Case* (1772) 20 St. Tr. 1.

illustrates the predominant attention paid under the English constitution to "remedies," that is, to modes of procedure by which to secure respect for a legal right, and by which to turn a merely nominal into an effective or real right. The Habeas Corpus Acts are essentially procedure Acts, and simply aim at improving the legal mechanism by means of which the acknowledged right to personal freedom may be enforced. They are intended, as is generally the case with legislation which proceeds under the influence of lawyers, simply to meet actual and experienced difficulties. Hence the Habeas Corpus Act of Charles the Second's reign was an imperfect or very restricted piece of legislative work, and Englishmen waited nearly a century and a half (1679-1816) before the procedure for securing the right to discharge from unlawful confinement was made complete. But this lawyer-like mode of dealing with a fundamental right had with all its defects the one great merit that legislation was directed to the right point. There is no difficulty, and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end, and have therefore done for the liberty of Englishmen more than could have been achieved by any declaration of rights. One may even venture to say that these Acts are of really more importance not only than the general proclamations of the Rights of Man which have often been put forward in foreign countries, but even than such very lawyer-like documents as the Petition of Right or the Bill of Rights, though these celebrated enactments show almost equally with the

Part II. Habeas Corpus Act that the law of the English constitution is at bottom judge-made law.<sup>1</sup>

Effect of writ of habeas corpus on authority of judges.

Every critic of the constitution has observed the effect of the Habeas Corpus Acts in securing the liberty of the subject; what has received less and deserves as much attention is the way in which the right to issue a writ of habeas corpus, strengthened as that right is by statute, determines the whole relation of the judicial body towards the executive. The authority to enforce obedience to the writ is nothing less than the power to release from imprisonment any person who in the opinion of the court is unlawfully deprived of his liberty, and hence in effect to put an end to or to prevent any punishment which the Crown or its servants may attempt to inflict in opposition to the rules of law as interpreted by the judges. The judges therefore are in truth, though not in name, invested with the means of hampering or supervising the whole administrative action of the government, and of at once putting a veto upon any proceeding not authorised by the letter of the law. Nor is this power one which has fallen into disuse by want of exercise. It has often been put forth, and this too in matters of the greatest consequence; the knowledge moreover of its existence governs the conduct of the administration. An example or two will best show the mode in which the "judiciary" (to use a convenient Americanism) can and do by means of the writ of habeas corpus keep a hold on the acts of the executive. In 1839 Canadian rebels, found

<sup>1</sup> Compare Imperial Constitution of 1804, ss. 60-63, under which a committee of the Senate was empowered to take steps for putting an end to illegal arrests by the Government. See Plouard, *Les Constitutions françaises* (1871-1876), p. 161.

guilty of treason in Canada and condemned to transportation, arrived in official custody at Liverpool on their way to Van Diemen's Land. The friends of the convicts questioned the validity of the sentence under which they were transported; the prisoners were thereupon taken from prison and brought upon a writ of habeas corpus before the Court of Exchequer. Their whole position having been considered by the court, it was ultimately held that the imprisonment was legal. But had the court taken a different view, the Canadians would at once have been released from confinement.<sup>1</sup> In 1859 an English officer serving in India was duly convicted of manslaughter and sentenced to four years' imprisonment: he was sent to England in military custody to complete there his term of punishment. The order under which he was brought to this country was technically irregular, and the convict having been brought on a writ of habeas corpus before the Queen's Bench, was on this purely technical ground set at liberty.<sup>2</sup> So, to take a very notorious instance of judicial authority in matters most nearly concerning the executive, the courts have again and again considered, in the case of persons brought before them by the writ of habeas corpus, questions as to the legality of impressment, and as to the limits within which the right of impressment may be exercised; and if, on the one hand, the judges have in this particular instance (which by the way is almost a singular one) supported the arbitrary powers of the prerogative, they have also strictly limited the exercise of this power within the bounds prescribed

<sup>1</sup> *The Case of the Canadian Prisoners* (1839) 5 M. & W. 32.

<sup>2</sup> *In re Allen* (1860) 30 L.J. (Q.B.) 38.

Part II. to it by custom or by statute.<sup>1</sup> Moreover, as already pointed out, the authority of the civil tribunals even when not actually put into force regulates the action of the government. In 1854 a body of Russian sailors were found wandering about the streets of Guildford, without any visible means of subsistence; they were identified by a Russian naval officer as deserters from a Russian man-of-war which had put into an English port; they were thereupon, under his instructions and with the assistance of the superintendent of police, conveyed to Portsmouth for the purpose of their being carried back to the Russian ship. Doubts arose as to the legality of the whole proceeding. The law officers were consulted, who thereupon gave it as their opinion that "the delivering-up of the Russian "sailors to the Lieutenant and the assistance offered "by the police for the purpose of their being conveyed back to the Russian ship were contrary to "law."<sup>2</sup> The sailors were presumably released; they no doubt would have been delivered by the Court had a writ of habeas corpus been applied for. Here then we see the judges in effect restraining the action of the executive in a matter which in most countries is considered one of administration or of policy lying beyond the range of judicial interference. The strongest examples, however, of interference by the judges with administrative proceedings are to be found in the decisions given under the Extradition Acts. Neither the Crown nor any servant of the

<sup>1</sup> See *The Case of Pressing Mariners* (1743) 18 St. Tr. 1323; Stephen, *Commentaries* (14th ed., 1903), vol. ii, pp. 574, 575; cf. Corner, *Forms of Writs and Other Proceedings on the Crown Side of the Court of Queen's Bench* (1844), p. 64, for form of habeas corpus for an impressed seaman.

<sup>2</sup> See Forsyth, *Cases and Opinions in Constitutional Law* (1869), p. 468.



Crown has any right to expel a foreign criminal from the country or to surrender him to his own government for trial.<sup>1</sup> A French forger, robber, or murderer who escapes from France to England cannot, independently of statutory enactments, be sent back to his native land for trial or punishment. The absence of any power on the part of the Crown to surrender foreign criminals to the authorities of their own state has been found so inconvenient, that the Extradition Acts, 1870-1906, have empowered the Crown to make treaties with foreign states for the mutual extradition of criminals or of persons charged with crime. The exercise of this authority is, however, hampered by restrictions which are imposed by the statute under which alone it exists. It therefore often happens that an offender arrested under the warrant of a Secretary of State and about to be

<sup>1</sup> See, however, *The King v. Lundy* (1690) 2 Ventris 314; *The King v. Kimberley* (1729) 2 Str. 848; *East India Company v. Campbell* (1749) 1 Ves. Senr. 246; *Mure v. Kaye* (1811) 4 Taunt. 34; and Chitty, *Criminal Law* (2nd ed., 1826), pp. 14-16, in support of the opinion that the Crown possessed a common law right of extradition as regards foreign criminals. This opinion may possibly once have been correct. (Compare, however, *The Queen v. Bernard* (1858) *Annual Register*, Appendix to Chronicle, 310, at p. 328, for opinion of Campbell, C.J., cited *In re Castioni* [1891] 1 Q.B. 149, at p. 153, by Sir C. Russell, *arguendo*.) It has, however, in any case (to use the words of a high authority) "ceased to be law now. If any magistrate were now to "arrest a person on this ground, the validity of the commitment "would certainly be tested, and, in the absence of special legislative "provisions, the prisoner as certainly discharged upon application to "one of the superior courts."—Clarke, *Extradition* (4th ed., 1903), p. 26. The case of *Musgrove v. Chun Teeong Toy* [1891] A.C. 272, which establishes that an alien has not a legal right enforceable by action, to enter British territory, suggests the possible existence of a common law right on the part of the Crown to expel an alien from British territory. [The admission and exclusion of aliens is now statutory. See Aliens Order, 1920, made under powers conferred by the Aliens Restriction Acts, 1914 and 1919.—Ed.]

Part II. handed over to the authorities of his own country conceives that, on some ground or other, his case does not fall within the precise terms of any Extradition Act. He applies for a writ of habeas corpus; he is brought up before the High Court; every technical plea he can raise obtains full consideration,<sup>1</sup> and if on any ground whatever it can be shown that the terms of the Extradition Act have not been complied with, or that they do not justify his arrest and surrender, he is as a matter of course at once set at liberty.<sup>2</sup> It is easy to perceive that the authority of the judges, exercised, as it invariably must be, in support of the strict rules of law, cuts down the discretionary powers of the Crown. It often prevents the English government from meeting public danger by measures of precaution which would as a matter of course be taken by the executive of any continental country. Suppose, for example, that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country.<sup>3</sup> In case of arrest or imprisonment they would at once be brought before the High Court

<sup>1</sup> *In re Belencontre* [1891] 2 Q.B. 122.

<sup>2</sup> *In re Coppin* (1866) L.R. 2 Ch. App. 47; *The Queen v. Wilson* (1877) 3 Q.B.D. 42.

<sup>3</sup> The Home Secretary now has power to order the deportation of any undesirable alien, if he considers that such action is in the public interest; *Alien Order*, 1920, art. 12 (b) (c); Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 204-205.—Ed.

on a writ of habeas corpus, and unless some specific legal ground for their detention could be shown, they would be forthwith set at liberty. Of the political or, to use foreign expressions, of the "administrative" reasons which might make the arrest or expulsion of a foreign refugee highly expedient, the judges would hear nothing; that he was arrested by order of the Secretary of State, that his imprisonment was a simple administrative act, that the Prime Minister or the Home Secretary was prepared to make affidavit that the arrest was demanded by the most urgent considerations of public safety, or to assure the Court that the whole matter was one of high policy and concerned national interests, would be no answer whatever to the demand for freedom under a writ of habeas corpus. All that any judge could inquire into would be, whether there was any rule of common or of statute law which would authorise interference with a foreigner's personal freedom. If none such could be found, the applicants would assuredly obtain their liberty. The plain truth is that the power possessed by the judges of controlling the administrative conduct of the executive has been, of necessity, so exercised as to prevent the development with us of any system corresponding to the "administrative law" of continental states. It strikes at the root of those theories as to the nature of administrative acts, and as to the "separation of powers," on which, as will be shown in a later chapter,<sup>1</sup> the *droit administratif* of France depends, and it deprives the Crown, which now means the Ministry of the day, of all discretionary authority. The actual or possible

<sup>1</sup> See ch. xii; cf. App. sec. i.

Part II. intervention, in short, of the courts, exercisable for the most part by means of the writ of habeas corpus, confines the action of the government within the strict letter of the law ; with us the state can punish, but it can hardly prevent the commission of crimes.

Contests  
of seven-  
teenth  
century  
about  
position of  
judges.

We can now see why it was that the political conflicts of the seventeenth century often raged round the position of the judges, and why the battle might turn on a point so technical as the inquiry, what might be a proper return to a writ of habeas corpus.<sup>1</sup> Upon the degree of authority and independence to be conceded to the Bench depended the colour and working of our institutions. To supporters, on the one hand, of the prerogative who, like Bacon, were not unfrequently innovators or reformers, judicial independence appeared to mean the weakness of the executive, and the predominance throughout the state of the conservative legalism, which found a representative in Coke. The Parliamentary leaders, on the other hand, saw, more or less distinctly, that the independence of the Bench was the sole security for the maintenance of the common law, which was nothing else than the rule of established customs modified only by Acts of Parliament, and that Coke in battling for the power of the judges was asserting the rights of the nation ; they possibly also saw, though this is uncertain, that the maintenance of rigid legality, inconvenient as it might sometimes prove, was the certain road to Parliamentary sovereignty.<sup>2</sup>

*Suspension of the Habeas Corpus Act.*—During

<sup>1</sup> *Darnel's Case* (1627) 3 St. Tr. 1 ; K. & L. 37.

<sup>2</sup> See Gardiner, *History of England*, vol. iii (1883), ch. xxii, for a statement of the different views entertained as to the position of judges.

periods of political excitement the power or duty of the courts to issue a writ of habeas corpus, and thereby compel the speedy trial or release of persons charged with crime, has been found an inconvenient or dangerous limitation on the authority of the executive government. Hence has arisen the occasion for statutes which are popularly called Habeas Corpus Suspension Acts. I say "popularly called," because if you take (as you may) the Act 34 Geo. III. c. 54<sup>1</sup> as a type of such enactments, you will see

Chapter  
V.

Suspension  
of Habeas  
Corpus  
Act.

<sup>1</sup> Of which s. 1 enacts "that every person or persons that are or shall be in prison within the kingdom of Great Britain at or upon the day on which this Act shall receive his Majesty's royal assent, or after, by warrant of his said Majesty's most honorable Privy Council, signed by six of the said Privy Council, for high treason, suspicion of high treason, or treasonable practices, or by warrant, signed by any of his Majesty's secretaries of state, for such causes as aforesaid, may be detained in safe custody, without bail or mainprize, until the first day of February one thousand seven hundred and ninety-five; and that no judge or justice of the peace shall bail or try any such person or persons so committed, without order from his said Majesty's Privy Council, signed by six of the said Privy Council, till the said first day of February one thousand seven hundred and ninety-five; any law or statute to the contrary notwithstanding."

The so-called suspension of the Habeas Corpus Act under a statute, such as that of 1794, produces both less and more effect than would the total repeal of the Habeas Corpus Acts. The suspension, while it lasts, makes it possible for the Government to arrest and keep in prison any persons declared in effect by the Government to be guilty or suspected of treasonable practices, and such persons have no means of obtaining either a discharge or a trial. But the suspension does not affect the position of persons not detained in custody under suspicion of treasonable practices. It does not therefore touch the ordinary liberty of ordinary citizens. The repeal of the Habeas Corpus Acts, on the other hand, would deprive every man in England of one security against wrongful imprisonment, but since it would leave alive the now unquestionable authority of the judges to issue and compel obedience to a writ of habeas corpus at common law, it would not, assuming the bench to do their duty, increase the power of the Government to imprison persons suspected of treasonable practices, nor materially diminish the freedom of any class of Englishmen. Cf. 3 Bl., *Comm.* 138; and see App. sec. i (6), p. 521.



Part II. that it hardly corresponds with its received name. The whole effect of the Act, which does not even mention the Habeas Corpus Act, is to make it impossible for any person imprisoned under a warrant signed by a Secretary of State on a charge of high treason, or on suspicion of high treason, to insist upon being either discharged or put on trial. No doubt this is a great diminution in the securities for personal freedom provided by the Habeas Corpus Acts; but it falls very far short of anything like a general suspension of the right to the writ of habeas corpus; it in no way affects the privileges of any person not imprisoned on a charge of high treason: it does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed; it does not in any wise touch the claim to a writ of habeas corpus possessed by every one, man, woman, or child, who is held in confinement otherwise than on a charge of crime. The particular statute 34 Geo. III. c. 54 is, and (I believe) every other Habeas Corpus Suspension Act affecting England, has been an annual Act, and must, therefore, if it is to continue in force, be renewed year by year. The sole, immediate, and direct result, therefore, of suspending the Habeas Corpus Act is this: the Ministry may for the period during which the Suspension Act continues in force constantly defer the trial of persons imprisoned on the charge of treasonable practices. This increase in the power of the executive is no trifle, but it falls far short of the process known in some foreign countries as "suspending the constitutional guarantees," or in France as the "proclamation of a state of

siege ”;<sup>1</sup> it, indeed, extends the arbitrary powers of the government to a far less degree than many so-called Coercion Acts. That this is so may be seen by a mere enumeration of the chief of the extraordinary powers which were conferred by comparatively recent enactments on the Irish executive. Under the Act of 1881 the Irish executive obtained the absolute power of arbitrary and preventive arrest, and could without breach of law detain in prison any person arrested on suspicion for the whole period for which the Act continued in force. It is true that the Lord Lieutenant could arrest only persons suspected of treason or of the commission of some act tending to interfere with the maintenance of law and order. But as the warrant itself to be issued by the Lord Lieutenant was made under the Act conclusive evidence of all matters contained therein, and therefore (*inter alia*) of the truth of the assertion that the arrested person or “suspect” was reasonably suspected, *e.g.* of treasonable practices, and therefore liable to arrest, the result clearly followed that neither the Lord Lieutenant nor any official acting under him could by any possibility be made liable to any legal penalty for any arrest, however groundless or malicious, made in due form within the words of the Act. The Irish government, therefore, could arrest any person whom the Lord Lieutenant thought fit to imprison, provided only that the warrant was in the form and contained the allegations required

<sup>1</sup> See Duguit, *Manuel de Droit Public français, Droit Constitutionnel* (1907), para. 76, pp. 510-513, and article “Etat de Siège” in Chéruel, *Dictionnaire historique des Institutions de la France* (8th ed., 1910), vol. i, v° Etat de siège, p. 375.

## Part II.

by the statute. Under the Prevention of Crime (Ireland) Act, 1882, the Irish executive was armed with the following (among other) extraordinary powers. The government could in the case of certain crimes<sup>1</sup> abolish the right to trial by jury,<sup>2</sup> could arrest strangers found out of doors at night under suspicious circumstances,<sup>3</sup> could seize any newspaper which, in the judgment of the Lord Lieutenant, contained matter inciting to treason or violence,<sup>4</sup> and could prohibit any public meeting which the Lord Lieutenant believed to be dangerous to the public peace or safety. Add to this that the Prevention of Crime Act, 1882, re-enacted (incidentally as it were) the Aliens Act of 1848, and thus empowered the British Ministry to expel from the United Kingdom any foreigner who had not before the passing of the Act been resident in the country for three years.<sup>5</sup> Not one of these extraordinary powers flows directly from a mere suspension of the Habeas Corpus Act; and, in truth, the best proof of the very limited legal effect of such so-called suspension is supplied by the fact that before a Habeas Corpus Suspension Act runs out its effect is, almost invariably, supplemented by legislation of a totally different character, namely, an Act of Indemnity.

Act of Indemnity.

*An Act of Indemnity.*<sup>6</sup>—Reference has already been made to Acts of Indemnity as the supreme instance of Parliamentary sovereignty. They are

<sup>1</sup> Viz. (a) treason or treason-felony; (b) murder or manslaughter; (c) attempt to murder; (d) aggravated crime of violence against the person; (e) arson, whether by common law or by statute; (f) attack on dwelling house.

<sup>2</sup> Section 1.

<sup>3</sup> Section 12.

<sup>4</sup> Section 13.

<sup>5</sup> Section 15.

<sup>6</sup> See Indemnity Act, 1920; Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 412, 413.

retrospective statutes which free persons who have broken the law from responsibility for its breach, and thus make lawful acts which when they were committed were unlawful. It is easy enough to see the connection between a Habeas Corpus Suspension Act and an Act of Indemnity. The Suspension Act, as already pointed out, does not free any person from civil or criminal liability for a violation of the law. Suppose that a Secretary of State or his subordinates should, during the suspension of the Habeas Corpus Act, arrest and imprison a perfectly innocent man without any cause whatever, except (it may be) the belief that it is conducive to the public safety that the particular person—say, an influential party leader such as Wilkes, Fox, or O'Connell—should be at a particular crisis kept in prison, and thereby deprived of influence. Suppose, again, that an arrest should be made by orders of the Ministry under circumstances which involve the unlawful breaking into a private dwelling-house, the destruction of private property, or the like. In each of these instances, and in many others which might easily be imagined, the Secretary of State who orders the arrest and the officials who carry out his commands have broken the law. They may have acted under the *bona fide* belief that their conduct was justified by the necessity of providing for the maintenance of order. But this will not of itself, whether the Habeas Corpus Act be suspended or not, free the persons carrying out the arrests from criminal and civil liability for the wrong they have committed. The suspension, indeed, of the Habeas Corpus Act may prevent the person arrested from taking at the

Part II. — moment any proceedings against a Secretary of State or the officers who have acted under his orders. For the sufferer is of course imprisoned on the charge of high treason or suspicion of treason, and therefore will not, while the suspension lasts, be able to get himself discharged from prison. The moment, however, that the Suspension Act expires he can, of course, apply for a writ of habeas corpus, and ensure that, either by means of being put on his trial or otherwise, his arbitrary imprisonment shall be brought to an end. In the cases we have supposed the prisoner has been guilty of no legal offence. The offenders are in reality the Secretary of State and his subordinates. The result is that on the expiration of the Suspension Act they are liable to actions or indictments for their illegal conduct, and can derive no defence whatever from the mere fact that, at the time when the unlawful arrest took place, the Habeas Corpus Act was, partially at any rate, not in force. It is, however, almost certain that, when the suspension of the Habeas Corpus Act makes it possible for the government to keep suspected persons in prison for a length of time without bringing them to trial, a smaller or greater number of unlawful acts will be committed, if not by the members of the Ministry themselves, at any rate by their agents. We may even go farther than this, and say that the unavowed object of a Habeas Corpus Suspension Act is to enable the government to do acts which, though politically expedient, may not be strictly legal. The Parliament which destroys one of the main guarantees for individual freedom must hold, whether wisely or not, that a crisis has arisen when the rights of individuals must be post-



poned to considerations of state. A Suspension Act would, in fact, fail of its main object, unless officials felt assured that, as long as they *bona fide*, and uninfluenced by malice or by corrupt motives, carried out the policy of which the Act was the visible sign, they would be protected from penalties for conduct which, though it might be technically a breach of law, was nothing more than the free exertion for the public good of that discretionary power which the suspension of the Habeas Corpus Act was intended to confer upon the executive. This assurance is derived from the expectation that, before the Suspension Act ceases to be in force, Parliament will pass an Act of Indemnity, protecting all persons who have acted, or have intended to act, under the powers given to the government by the statute. This expectation has not been disappointed. An Act suspending the Habeas Corpus Act, which has been continued for any length of time, has constantly been followed by an Act of Indemnity. Thus the Act to which reference has already been made, 34 Geo. III. c. 54, was continued in force by successive annual re-enactments for seven years, from 1794 to 1801. In the latter year an Act was passed, 41 Geo. III. c. 66, "indemnifying such persons as since the first "day of February, 1793, have acted in the apprehend- "ing, imprisoning, or detaining in custody in Great "Britain of persons suspected of high treason or "treasonable practices." It cannot be disputed that the so-called suspension of the Habeas Corpus Act, which every one knows will probably be followed by an Act of Indemnity, is, in reality, a far greater interference with personal freedom than would appear

**Part II.** from the very limited effect, in a merely legal point of view, of suspending the right of persons accused of treason to demand a speedy trial. The Suspension Act, coupled with the prospect of an Indemnity Act, does in truth arm the executive with arbitrary powers. Still, there are one or two considerations which limit the practical importance that can fairly be given to an expected Act of Indemnity. The relief to be obtained from it is prospective and uncertain. Any suspicion on the part of the public, that officials had grossly abused their powers, might make it difficult to obtain a Parliamentary indemnity for things done while the Habeas Corpus Act was suspended. As regards, again, the protection to be derived from the Act by men who have been guilty of irregular, illegal, oppressive, or cruel conduct, everything depends on the terms of the Act of Indemnity. These may be either narrow or wide. The Indemnity Act, for instance, of 1801, gives a very limited amount of protection to official wrongdoers. It provides, indeed, a defence against actions or prosecutions in respect of anything done, commanded, ordered, directed, or advised to be done in Great Britain for apprehending, imprisoning, or detaining in custody any person charged with high treason or treasonable practices. And no doubt such a defence would cover any irregularity or merely formal breach of the law, but there certainly could be imagined acts of spite or extortion, done under cover of the Suspension Act, which would expose the offender to actions or prosecutions, and could not be justified under the terms of the Indemnity Act. Reckless cruelty to a political prisoner, or, still more certainly, the arbitrary punishment or the

execution of a political prisoner, between 1793 and 1801, would, in spite of the Indemnity Act, have left every man concerned in the crime liable to suffer punishment. Whoever wishes to appreciate the moderate character of an ordinary Act of Indemnity passed by the Imperial Parliament, should compare such an Act as the Act of Indemnity, 1801, with the enactment whereby the Jamaica House of Assembly attempted to cover Governor Eyre from all liability for unlawful deeds done in suppressing rebellion during 1865. An Act of Indemnity, again, though it is the legalisation of illegality, is also, it should be noted, itself a law. It is something in its essential character, therefore, very different from the proclamation of martial law, the establishment of a state of siege, or any other proceeding by which the executive government at its own will suspends the law of the land. It is no doubt an exercise of arbitrary sovereign power; but where the legal sovereign is a Parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law.

## CHAPTER VI

### THE RIGHT TO FREEDOM OF DISCUSSION<sup>1</sup>

Part II. THE Declaration of the Rights of Man<sup>2</sup> and the French Constitution of 1791 proclaim freedom of discussion and the liberty of the press in terms which are still cited in text-books<sup>3</sup> as embodying maxims of French jurisprudence.

Principles  
laid down  
in foreign  
constitu-  
tion.

*"La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi."*<sup>4</sup>

*"La constitution garantit, comme droit naturel et civil . . . la liberté à tout homme de parler, d'écrire, d'imprimer et publier ses pensées, sans que ses écrits puissent être soumis à aucune censure ou inspection avant leur publication."*<sup>5</sup>

Belgian law, again, treats the liberty of the press as a fundamental article of the constitution.

*"Art 18. La presse est libre; la censure ne pourra jamais être établie; il ne peut être exigé*

<sup>1</sup> See App. sec. ii (2), for note on "Liberty of Discussion."

<sup>2</sup> Duguit et Monnier, *Les Constitutions et les principales lois politiques de la France depuis 1789* (1898), Constitution du 3 Sept. 1791, p. 1.

<sup>3</sup> Bourguignon, *Eléments généraux de Législation française* (1873), p. 468.

<sup>4</sup> *Déclaration des droits*, art. 11, Plouard, *Les Constitutions françaises* (1871-1876), p. 16; Duguit et Monnier, *op. cit.*, p. 1.

<sup>5</sup> *Op. cit.*, p. 18; *op. cit.*, p. 4.

*"de cautionnement des écrivains, éditeurs ou imprimeurs.*

Chapter  
VI.

*"Lorsque l'auteur est connu et domicilié en Belgique, l'éditeur, l'imprimeur ou le distributeur ne peut être poursuivi."*<sup>1</sup>

Both the revolutionists of France and the constitutionalists of Belgium borrowed their ideas about freedom of opinion and the liberty of the press from England, and most persons form such loose notions as to English law that the idea prevails in England itself that the right to the free expression of opinion, and especially that form of it which is known as the "liberty of the press," are fundamental doctrines of the law of England in the same sense in which they were part of the ephemeral constitution of 1791 and still are embodied in the articles of the existing Belgian constitution; and, further, that our courts recognise the right of every man to say and write what he pleases, especially on social, political, or religious topics, without fear of legal penalties. Yet this notion, justified though it be, to a certain extent, by the habits of modern English life, is essentially false, and conceals from students the real attitude of English law towards what is called "freedom of thought," and is more accurately described as the "right to the free expression of opinion." As every lawyer knows, the phrases "freedom of discussion" or "liberty of the press" are rarely found in any part of the statute-book nor among the maxims of the common law.<sup>2</sup> As terms of art they are indeed quite unknown to our courts. At no time has there in

No principle of freedom of discussion recognised by English law.

<sup>1</sup> *Constitution de la Belgique*, art. 18.

<sup>2</sup> It appears, however, in the preamble to Lord Campbell's Libel Act, 1843.



Part II. England been any proclamation of the right to liberty of thought or to freedom of speech. The true state of things cannot be better described than in these words from an excellent treatise on the law of libel:—

“Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment.”<sup>1</sup>

Any man may, therefore, say or write whatever he likes, subject to the risk of, it may be, severe punishment if he publishes any statement (either by word of mouth, in writing, or in print) which he is not legally entitled to make. Nor is the law of England specially favourable to free speech or to free writing in the rules which it maintains in theory and often enforces in fact as to the kind of statements which a man has a legal right to make. Above all, it recognises in general no special privilege on behalf of the “press,” if by that term we mean, in conformity with ordinary language, periodical literature in general, and particularly the newspapers. In truth there is little in the statute-book which can be called a “press law.”<sup>2</sup> The law

<sup>1</sup> Odgers, *Libel and Slander*, Introduction (3rd ed., 1896), p. 12.

<sup>2</sup> For exceptions to this, see e.g. Libel Act, 1845, and Newspaper Libel and Registration Act, 1881. It is, however, true, as pointed out by a critic (see Fisher & Strahan, *The Law of the Press* (2nd ed., 1898), p. iii), that “there is slowly growing up a distinct law of the Press.”

English law only secures that no one shall be punished except for statements proved to be breach of law.

of the press as it exists here is merely part of the law of libel, and it is well worth while to trace out with some care the restrictions imposed by the law of libel on the "freedom of the press," by which expression I mean a person's right to make any statement he likes in books or newspapers.

There are many statements with regard to individuals which no man is entitled to publish in writing or print; it is a libel (speaking generally) thus to publish any untrue statement about another which is calculated to injure his interests, character, or reputation. Every man who directly or indirectly makes known or, as the technical expression goes, "publishes" such a statement, gives currency to a libel and is liable to an action for damages. The person who makes a defamatory statement and authorises its publication in writing, the person who writes, the publisher who brings out for sale, the printer who prints, the vendor who distributes a libel, are each guilty of publication, and may each severally be sued. The gist of the offence being the making public, not the writing of the libel, the person who having read a libel sends it on to a friend, is a libeller; and it would seem that a man who reads aloud a libel, knowing it to be such, may be sued. This separate liability of each person concerned in a wrongful act is, as already pointed out, a very noticeable

Libels on  
individ-  
uals.

The tendency of recent press legislation is to a certain extent to free the proprietors of newspapers from the full amount of liability which attaches to other persons for the *bona fide* publication of defamatory statements made at public meetings and the like. See especially the Law of Libel Amendment Act, 1888, s. 4. Whether this deviation from the principles of the common law is, or is not, of benefit to the public, is an open question which can be answered only by experience. [For the statutory regulation of the Press, see App. sec. ii (2) (B).—Ed.]

## Part II.

characteristic of our law. Honest belief, moreover, and good intentions on the part of a libeller, are no legal defence for his conduct. Nor will it avail him to show that he had good reason for thinking the false statement which he made to be true. Persons often must pay heavy damages for giving currency to statements which were not meant to be falsehoods, and which were reasonably believed to be true. Thus it is libellous to publish of a man who has been convicted of felony but has worked out his sentence that he "is a convicted felon." It is a libel on the part of *X* if *X* publishes that *B* has told him that *A*'s bank has stopped payment, if, though *B* in fact made the statement to *X*, and *X* believed the report to be true, it turns out to be false. Nor, again, are expressions of opinion when injurious to another at all certain not to expose the publisher of them to an action. A "fair" criticism, it is often said, is not libellous; but it would be a grave mistake to suppose that critics, either in the press or elsewhere, have a right to publish whatever criticisms they think true. Every one has a right to publish fair and candid criticism. But "a critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation."<sup>1</sup> A writer in the press and an artist or actor whose performances are criticised are apt to draw the line between "candid criticism" and "personal censure" at very different points. And when on this matter there is a difference of opinion between a critic and his victim, the delicate question what is meant by

<sup>1</sup> *Whistler v. Ruskin* (1878) *The Times Newspaper*, Nov. 27, p. 11, per Huddleston, B.

fairness has to be determined by a jury, and may be so answered as greatly to curtail the free expression of critical judgments. Nor let it be supposed that the mere "truth" of a statement is of itself sufficient to protect the person who publishes it from liability to punishment. For though the fact that an assertion is true is an answer to an action for libel, a person may be criminally punished for publishing statements which, though perfectly true, damage an individual without being of any benefit to the public. To write, for example, and with truth of *A* that he many years ago committed acts of immorality may very well expose the writer *X* to criminal proceedings, and *X* if put on his trial will be bound to prove not only that *A* was in fact guilty of the faults imputed to him, but also that the public had an interest in the knowledge of *A*'s misconduct. If *X* cannot show this, he will find that no supposed right of free discussion or respect for liberty of the press will before an English judge save him from being found guilty of a misdemeanour and sent to prison.

So far in very general terms of the limits placed by the law of libel on freedom of discussion as regards the character of individuals. Let us now observe for a moment the way in which the law of libel restricts in theory, at least, the right to criticise the conduct of the government.

Libels on  
govern-  
ment.

Every person commits a misdemeanour who publishes (orally or otherwise) any words or any document with a seditious intention. Now a seditious intention means an intention to bring into hatred or contempt, or to excite disaffection against the King or the government and constitution of the United

Part II. Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite British subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to promote feelings of illwill and hostility between different classes.<sup>1</sup> And if the matter published is contained in a written or printed document the publisher is guilty of publishing a seditious libel. The law, it is true, permits the publication of statements meant only to show that the Crown has been misled, or that the government has committed errors, or to point out defects in the government or the constitution with a view to their legal remedy, or with a view to recommend alterations in Church or State by legal means, and, in short, sanctions criticism on public affairs which is *bona fide* intended to recommend the reform of existing institutions by legal methods. But any one will see at once that the legal definition of a seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would if rigidly enforced be inconsistent with prevailing forms of political agitation.

Expression  
of opinion  
on religious  
or moral  
questions.

The case is pretty much the same as regards the free expression of opinion on religious or moral questions.<sup>2</sup> Of late years circumstances have recalled attention to the forgotten law of blasphemy. But it surprises most persons to learn that, on one view of the law, any one who publishes a denial of the truth of Christianity in general or of the existence of God, whether the terms of such publication are decent or

<sup>1</sup> See Stephen, *Digest of the Criminal Law* (6th ed., 1904), arts. 96, 97, 98.

<sup>2</sup> *Ibid.*, arts. 179-183.



otherwise, commits the misdemeanour of publishing a blasphemous libel, and is liable to imprisonment; that, according to another view of the law, any one is guilty of publishing a blasphemous libel who publishes matter relating to God, Jesus Christ, or the Book of Common Prayer intended to wound the feelings of mankind, or to excite contempt against the Church by law established, or to promote immorality; and that it is at least open to grave doubt how far the publications which thus wound the feelings of mankind are exempt from the character of blasphemy because they are intended in good faith to propagate opinions which the person who publishes them regards as true.<sup>1</sup> Most persons, again, are astonished to find that the denial of the truth of Christianity or of the authority of the Scriptures, by "writing, printing, teaching, or advised speaking" on the part of any person who has been educated in or made profession of Christianity in England, is by statute a criminal offence entailing very severe penalties.<sup>2</sup> When once, however, the principles of the common law and the force of the enactments still contained in the statute-book are really appreciated, no one can maintain that the law of England recognises anything like that natural right to the free communication of thoughts and opinions which was proclaimed in France a little over a hundred years ago to

<sup>1</sup> But see *The Queen v. Ramsay and Foote* (1883) 48 L.T. 733; and *Bowman v. Secular Society Ltd.* [1914] A.C. 406, where the House of Lords held that the propagation of anti-Christian doctrines, apart from scurrility or profanity, did not constitute the offence of blasphemy.—Ed.

<sup>2</sup> See 9 & 10 Will. III. c. 35, as amended by 53 Geo. III. c. 160, and Stephen, *op. cit.*, art. 181; cf. *Attorney-General v. Bradlaugh* (1885) 14 Q.B.D. 667, at p. 719, per Lindley, L.J.

Part II be one of the most valuable Rights of Man. It is quite clear, further, that the effect of English law, whether as regards statements made about individuals, or the expression of opinion about public affairs, or speculative matters, depends wholly upon the answer to the question who are to determine whether a given publication is or is not a libel. The reply (as we all know) is, that in substance this matter is referred to the decision of a jury. Whether in any given case a particular individual is to be convicted of libel depends wholly upon their judgment, and they have to determine the questions of truth, fairness, intention, and the like, which affect the legal character of a published statement.<sup>1</sup>

Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written. Such "liberty" may vary at different times and seasons from unrestricted license to very severe restraint, and the experience of English history during the last two centuries shows that under the law of libel the amount of latitude conceded to the expression of opinion has, in fact, differed greatly according to the condition of popular sentiment. Until very recent times the law, moreover, has not recognised any

<sup>1</sup> "The truth of the matter is very simple when stripped of all ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this: that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable [i.e. that which twelve of his countrymen think is blamable]. This in plain common sense is the substance of all that has been said on the matter."—*The King v. Cuthell* (1799) 27 St. Tr. 642, at p. 675.

privilege on the part of the press. A statement which is defamatory or blasphemous, if made in a letter or upon a card, has exactly the same character if made in a book or a newspaper. The protection given by the Belgian constitution to the editor, printer, or seller of a newspaper involves a recognition of special rights on the part of persons connected with the press which is quite inconsistent with the general theory of English law. It is hardly an exaggeration to say, from this point of view, that liberty of the press is not recognised in England.

Why then has the liberty of the press been long reputed as a special feature of English institutions?

The answer to this inquiry is, that for about two centuries the relation between the government and the press has in England been marked by all those characteristics which make up what we have termed the "rule" or "supremacy" of law, and that just because of this, and not because of any favour shown by the law of England towards freedom of discussion, the press, and especially the newspaper press, has practically enjoyed with us a freedom which till recent years was unknown in continental states. Any one will see that this is so who examines carefully the situation of the press in modern England, and then contrasts it either with the press law of France or with the legal condition of the press in England during the sixteenth and seventeenth centuries.

Why the liberty of the press has been thought peculiar to England.

The present position of the English press is marked by two features.

First, "The liberty of the press," says Lord Mansfield, "consists in printing without any previous

Part II. "license, subject to the consequences of law."<sup>1</sup> "The  
 The position of the press in modern England. No censorship.  
 "law of England," says Lord Ellenborough, "is a  
 "law of liberty, and consistently with this liberty  
 "we have not what is called an *imprimatur*; there  
 "is no such preliminary license necessary; but if  
 "a man publish a paper, he is exposed to the penal  
 "consequences, as he is in every other act, if it be  
 "illegal."<sup>2</sup>

These dicta show us at once that the so-called liberty of the press is a mere application of the general principle, that no man is punishable except for a distinct breach of the law.<sup>3</sup> This principle is radically inconsistent with any scheme of licence or censorship by which a man is hindered from writing or printing anything which he thinks fit, and is hard to reconcile even with the right on the part of the courts to restrain the circulation of a libel, until at any rate the publisher has been convicted of publishing it. It is also opposed in spirit to any regulation requiring from the publisher of an intending newspaper a preliminary deposit of a certain sum of money, for the sake either of ensuring that newspapers should be published only by solvent persons, or that if a newspaper should contain libels there shall be a certainty of obtaining damages from the proprietor. No sensible person will argue that to demand a deposit from the owner of a newspaper, or to impose other limitations upon the right of publishing periodicals, is of necessity inexpedient or unjust. All that is here insisted upon is, that such

<sup>1</sup> *The King v. Dean of St. Asaph* (1784) 3 T.R. 428 (note).

<sup>2</sup> *The King v. Cobbett* (1804) 29 St. Tr. 1; see Odgers, *Libel and Slander* (3rd ed., 1896), p. 10.

<sup>3</sup> See p. 188, *ante*.

checks and preventive measures are inconsistent with the pervading principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence. Hence, with one exception,<sup>1</sup> which is a quaint survival from a different system, no such thing is known with us as a license to print, or a censorship either of the press or of political newspapers. Neither the government nor any other authority has the right to seize or destroy the stock of a publisher because it consists of books, pamphlets, or papers which in the opinion of the government contain seditious or libellous matter. Indeed, the courts themselves will, only under very special circumstances, even for the sake of protecting an individual from injury, prohibit the publication or republication of a libel, or restrain its sale until the matter has gone before a jury, and it has been established by their verdict that the words complained of are libellous.<sup>2</sup> Writers in the press are, in short, like every other person, subject to the law of the realm, and nothing else. Neither the government nor the courts have (speaking generally) any greater power to prevent or oversee the publication of a newspaper than the writing and sending of a letter. Indeed, the simplest way of setting forth broadly the position of writers in the press is to say that they stand in substantially the same position as letter-writers. A man who scribbles blasphemy on a gate<sup>3</sup>

<sup>1</sup> I.e. the licensing of the performance of stage plays by the Lord Chamberlain. See Theatres Act, 1843, s. 12, and App. sec. ii (2) (B), p. 588, for restrictions on press reporting.

<sup>2</sup> Compare Odgers, *op. cit.*, chap. xiii, especially pp. 388-399, with the first edition (1881), pp. 13-16.

<sup>3</sup> *The Queen v. Pooley* (1857), cited Stephen, *Digest of the Criminal Law* (7th ed., 1926), p. 160, note 2.



Part II. and a man who prints blasphemy in a paper or in a book commit exactly the same offence, and are dealt with in England on the same principles. Hence also writers in and owners of newspapers have, or rather had until very recently, no special privilege protecting them from liability.<sup>1</sup> Look at the matter which way you will, the main feature of liberty of the press as understood in England is that the press (which means, of course, the writers in it) is subject only to the ordinary law of the land.

Press  
offences  
dealt with  
by ordin-  
ary Courts.

*Secondly*, Press offences, in so far as the term can be used with reference to English law, are tried and punished only by the ordinary courts of the country, that is, by a judge and jury.<sup>2</sup>

Since the Restoration,<sup>3</sup> offences committed through the newspapers, or, in other words, the publication therein of libels whether defamatory, seditious, or blasphemous, have never been tried by any special tribunal. Nothing to Englishmen seems more a matter of course than this. Yet nothing has in reality contributed so much to free the periodical press from any control. If the criterion whether a publication be libellous is the opinion of the jury, and a man may

<sup>1</sup> This statement must be to a certain extent qualified in view of the Libel Act, 1843, the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888, which do give some amount of special protection to *bona fide* reports, e.g. of public meetings, in newspapers. See App. sec. ii (2) (B), pp. 587-591.

<sup>2</sup> The existence, however, of process by criminal information, and the rule that truth was no justification, had the result that during the eighteenth century seditious libel rose almost to the rank of a press offence, to be dealt with, if not by separate tribunals, at any rate by special rules enforced by a special procedure.

<sup>3</sup> See as to the state of the press under the Commonwealth, Masson, *Life of Milton* (1873), vol. iii, pp. 265-297. Substantially the possibility of trying press offences by special tribunals was put an end to by the abolition of the Star Chamber in 1641; Star Chamber Abolition Act, 1641.

publish anything which twelve of his countrymen think is not blamable, it is impossible that the Crown or the Ministry should exert any stringent control over writings in the press, unless (as indeed may sometimes happen) the majority of ordinary citizens are entirely opposed to attacks on the government. The times when persons in power wish to check the excesses of public writers are times at which a large body of opinion or sentiment is hostile to the executive. But under these circumstances it must, from the nature of things, be at least an even chance that the jury called upon to find a publisher guilty of printing seditious libels may sympathise with the language which the officers of the Crown deem worthy of punishment, and hence may hold censures which are prosecuted as libels to be fair and laudable criticism of official errors. Whether the control indirectly exercised over the expression of opinion by the verdict of twelve commonplace Englishmen is at the present day certain to be as great a protection to the free expression of opinion, even in political matters, as it proved a century ago, when the sentiment of the governing body was different from the prevalent feeling of the class from which jurymen were chosen, is an interesting speculation into which there is no need to enter. What is certain is, that the practical freedom of the English press arose in great measure from the trial with us of "press offences," like every other kind of libel, by a jury.

The liberty of the press, then, is in England simply one result of the universal predominance of the law of the land. The terms "liberty of the press," "press offences," "censorship of the press," and the like, are all but unknown to English lawyers, simply because

**Part II.** any offence which can be committed through the press is some form of libel, and is governed in substance by the ordinary law of defamation.

These things seem to us at the present day so natural as hardly to be noticeable; let us, however, glance as I have suggested at the press law of France both before and since the Revolution; and also at the condition of the press in England up to nearly the end of the seventeenth century. Such a survey will prove to us that the treatment in modern England of offences committed through the newspapers affords an example, as singular as it is striking, of the legal spirit which now pervades every part of the English constitution.

Comparison with the press law of France.

An Englishman who consults French authorities is struck with amazement at two facts: press law<sup>1</sup> has long constituted and still constitutes to a certain extent a special department of French legislation, and press offences have been, under every form of government which has existed in France, a more or less

<sup>1</sup> The press is now governed in France by the *Loi sur la liberté de la presse*, 29-30 Juill. 1881. This law repeals all earlier edicts, decrees, laws and ordinances on the subject. Immediately before this law was passed there were in force more than thirty enactments regulating the position of the French press, and inflicting penalties on offences which could be committed by writers in the press; and the three hundred and odd closely printed pages of Dalloz, treating of laws on the press, show that the enactments then in vigour under the Republic were as nothing compared to the whole mass of regulations, ordinances, decrees, and laws which, since the earliest days of printing down to the year 1881, have been issued by French rulers with the object of controlling the literary expression of opinion and thought. See Dalloz, *Répertoire de Législation et de Jurisprudence*, vol. xxxvi (1856), v° presse, pp. 384-776, spécial; tit. i. ch. i, pp. 386-394, and tit. ii, ch. iv, pp. 445-491. Cf. *Supplément au Répertoire*, vol. xiii (1893), v° presse, pp. 247-262 and pp. 271-308; cf. vol. ii, 1929, v° presse, pp. 569, 571; *Additions au Répertoire*, 1938, v° presse, p. 651; Roger et Sorel, *Codes et Lois usuelles* (1882), v° presse, pp. 637-652; Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 86, pp. 575-582.

special class of crimes. The Acts which have been passed in England with regard to the press since the days of Queen Elizabeth do not in number equal one-tenth, or even one-twentieth, of the laws enacted during the same period on the same subject in France. The contrast becomes still more marked if we compare the state of things in the two countries since the beginning of the eighteenth century, and (for the sake of avoiding exaggeration) put the laws passed since that date, and which were till 1881 in force in France, against every Act which, whether repealed or unrepealed, has been passed in England since the year 1700. It will be found that the French press code consisted, till after the establishment of the present Republic, of over thirty enactments, whilst the English Acts about the press passed since the beginning of the last century do not exceed a dozen, and, moreover, have gone very little way towards touching the freedom of writers.

The ground of this difference lies in the opposite views taken in the two countries of the proper relation of the state to literature, or, more strictly, to the expression of opinion in print.

In England the doctrine has since 1700 in substance prevailed that the government has nothing to do with the guidance of opinion, and that the sole duty of the state is to punish libels of all kinds, whether they are expressed in writing or in print. Hence the government has (speaking generally) exercised no special control over literature, and the law of the press, in so far as it can be said to have existed, has been nothing else than a branch or an application of the law of libel.

## Part II.

In France, literature has for centuries been considered as the particular concern of the state. The prevailing doctrine, as may be gathered from the current of French legislation, has been, and still to a certain extent is, that it is the function of the administration not only to punish defamation, slander, or blasphemy, but to guide the course of opinion, or, at any rate, to adopt preventive measures for guarding against the propagation in print of unsound or dangerous doctrines. Hence the huge amount and the special and repressive character of the press laws which have existed in France.

Up to the time of the Revolution the whole literature of the country was avowedly controlled by the state. The right to print or sell books and printed publications of any kind was treated as a special privilege or monopoly of certain libraries; the regulations (*réglements*) of 1723 (some part of which was till quite recently in force<sup>1</sup>) and of 1767 confined the right of sale and printing under the severest penalties to librarians who were duly licensed.<sup>2</sup> The right to publish, again, was submitted to the strictest censorship, exercised partly by the University, (an entirely ecclesiastical body), partly by the Parliaments, partly by the Crown. The penalties of death, of the galleys, of the pillory, were from time to time imposed upon the printing or sale of forbidden works. These punishments were often evaded; but they after all retained practical force till the very eve of the Revolution. The most celebrated literary works of France

<sup>1</sup> See Dalloz, *Répertoire de Législation*, vol. xxxvi (1856), v<sup>o</sup> presse, tit. i, ch. i. Cf. Roger et Sorel, *Codes et Lois usuelles* (1882), v<sup>o</sup> presse, pp. 637-652.

<sup>2</sup> *Ibid.*



were published abroad. Montesquieu's *Esprit des Lois* appeared at Geneva. Voltaire's *Henriade* was printed in England; the most remarkable of his and of Rousseau's writings were published in London, in Geneva, or in Amsterdam. In 1775 a work entitled *Philosophie de la Nature* was destroyed by the order of the Parliament of Paris, the author was decreed guilty of treason against God and man, and would have been burnt if he could have been arrested. In 1781, eight years before the meeting of the States General, Raynal was pronounced by the Parliament guilty of blasphemy on account of his *Histoire des Indes*.<sup>1</sup> The point, however, to remark is, not so much the severity of the punishments which under the *Ancien Régime* were intended to suppress the expression of heterodox or false beliefs, as the strict maintenance down to 1789 of the right and duty of the state to guide the literature of the country. It should further be noted that down to that date the government made no marked distinction between periodical and other literature. When the *Lettres Philosophiques* could be burnt by the hangman, when the publication of the *Henriade* and the *Encyclopédie* depended on the goodwill of the King, there was no need for establishing special restrictions on newspapers. The daily or weekly press, moreover, hardly existed in France till the opening of the States General.<sup>2</sup>

<sup>1</sup> See Dalloz, *Répertoire de Législation*, vol. xxxvi (1856), v<sup>o</sup> presse, tit. i, ch. i, p. 386. Cf. Roger et Sorel, *Codes et Lois usuelles* (1882), v<sup>o</sup> presse, pp. 637-652.

<sup>2</sup> See Rocquain, *L'Esprit révolutionnaire avant la Révolution* (1878), for a complete list of "*Livres Condamnés*" from 1715 to 1789. Rocquain's book is full of information on the arbitrariness of the French Government during the reigns of Louis XV and Louis XVI.

Part II.

The Revolution (it may be fancied) put an end to restraints upon the press. The Declaration of the Rights of Man proclaimed the right of every citizen to publish and print his opinions, and the language has been cited<sup>1</sup> in which the Constitution of 1791 guaranteed to every man the natural right of speaking, printing, and publishing his thoughts without having his writings submitted to any censorship or inspection prior to publication. But the Declaration of Rights and this guarantee were practically worthless. They enounced a theory which for many years was utterly opposed to the practice of every French government.

The Convention did not establish a censorship, but under the plea of preventing the circulation of seditious works it passed the law of 29th March 1793, which silenced all free expression of opinion. The Directory imitated the Convention. Under the First Empire the newspaper press became the property of the government, and the sale, printing, and publication of books was wholly submitted to imperial control and censorship.<sup>2</sup>

The years which elapsed from 1789 to 1815 were, it may be suggested, a revolutionary era which provoked or excused exceptional measures of state interference. Any one, however, who wants to see how consonant to the ideas which have permanently governed French law and French habits is the notion that the administration should by some means keep its hand on the national literature of the country, ought to note with care the course of legislation from

<sup>1</sup> See p. 238, *ante*.

<sup>2</sup> Dalloz, *Répertoire de Législation*, vol. xxxvi (1856), v° presse, tit. i, ch. i, p. 386.

the Restoration to the present day. The attempt, indeed, to control the publication of books has been by slow degrees given up; but one government after another has, with curious uniformity, proclaimed the freedom and ensured the subjection of the newspaper press. From 1814 to 1830 the censorship was practically established (21st Oct. 1814), was partially abolished, was abolished (1819), was re-established and extended (1820), and was re-abolished (1828).<sup>1</sup> The Revolution of July 1830 was occasioned by an attempt to destroy the liberty of the press. The Charter made the abolition of the censorship part of the constitution, and since that date no system of censorship has been in name re-established. But as regards newspapers, the celebrated decree of 17th February 1852 enacted restrictions more rigid than anything imposed under the name of *la censure* by any government since the fall of Napoleon I. The government took to itself under this law, in addition to other discretionary powers, the right to suppress any newspaper without the necessity of proving the commission of any crime or offence by the owner of the paper or by any writer in its columns.<sup>2</sup> No one, further, could under this decree set up a paper without official authorisation. Nor have different forms of the censorship been the sole restrictions imposed in France on the liberty of the press. The combined operations of enactments passed during the existence of the Republic of 1848, and under the Empire, was (among other things) to make the signature of newspaper articles by their

<sup>1</sup> See Duguit, *Traité de Droit constitutionnel* (2nd ed., vol. v, 1925), ch. iii, para. 35, pp. 414, 415.

<sup>2</sup> Décret, 17 Février, 1852, sec. 32; Roger et Sorel, *Codes et Lois usuelles* (1882), v° presse, p. 646.

Part II. authors compulsory,<sup>1</sup> to require a large deposit from any person who wished to establish a paper,<sup>2</sup> to withdraw all press offences whatever from the cognisance of a jury,<sup>3</sup> to re-establish or reaffirm the provision contained in the *réglement* of 1723 by which no one could carry on the trade of a librarian or printer (*commerce de la librairie*) without a license. It may, in fact, be said with substantial truth that between 1852 and 1870 the newspapers of France were as much controlled by the government as was every kind of literature before 1789, and that the Second Empire exhibited a retrogression towards the despotic principles of the *Ancien Régime*. The Republic,<sup>4</sup> it is true, has abolished the restraints on the liberty of the press which grew up both before and under the

<sup>1</sup> Roger et Sorel, *op. cit.* (1882), v° état de siège, p. 436, loi du 16 Juillet, 1850.

<sup>2</sup> Roger et Sorel, *op. cit.* (1882), v° presse, p. 646, loi du 16 Juillet, 1850.

<sup>3</sup> Lois, 31 Dec., 1851.

<sup>4</sup> One thing was perfectly clear and deserved notice. The legislation of the existing Republic was not till 1881, any more than that of the Restoration or the Empire, based on the view of the press which pervaded the modern law of England. "Press law" still formed a special department of the law of France. "Press offences" were a particular class of crimes, and there were at least two provisions, and probably several more, to be found in French laws which conflicted with the doctrine of the liberty of the press as understood in England. A law passed under the Republic (6th July, 1871. Roger et Sorel, *op. cit.*, p. 652) reimposed on the proprietors of newspapers the necessity of making a large deposit, with the proper authorities, as a security for the payment of fines or damages incurred in the course of the management of the paper. A still later law (29th December, 1875, s. 5. Roger et Sorel, *op. cit.*, p. 652), while it submitted some press offences to the judgment of a jury, subjected others to the cognisance of courts of which a jury formed no part. The law of 29th July, 1881, established the freedom of the press. Later French legislation exhibited, no doubt, a violent reaction against all attempts to check the freedom of the press, but in its very effort to secure this freedom betrayed the existence of the notion that offences committed through the press required in some sort exceptional treatment.

Empire. But though for the last twenty-seven years the ruling powers in France have favoured the liberty or licence of the press, nothing is more plain than that until quite recently the idea that press offences were a peculiar class of offences to be dealt with in a special way and punished by special courts was accepted by every party in France. This is a matter of extreme theoretical importance. It shows how foreign to French notions is the idea that every breach of law ought to be dealt with by the ordinary law of the land. Even a cursory survey—and no other is possible in these lectures—of French legislation with regard to literature proves, then, that from the time when the press came into existence up to almost the present date the idea has held ground that the state, as represented by the executive, ought to direct or control the expression of opinion, and that this control has been exercised by an official censorship—by restrictions on the right to print or sell books—and by the subjection of press offences to special laws administered by special tribunals. The occasional relaxation of these restrictions is of importance. But their recurring revival is of far more significance than their temporary abolition.<sup>1</sup>

Let us now turn to the position of the English press during the sixteenth and seventeenth centuries.

Contrast with position of press in England during seventeenth century.

<sup>1</sup> Note the several laws passed since 1881 to repress the abuse of freedom in one form or another by the press, e.g. the law of 2nd August, 1882, modified and completed by the law of 16th March, 1898, for the suppression of violations of moral principles (*outrages aux bonnes mœurs*) by the press, the law of 28th July, 1894, to suppress the advocacy of anarchical principles by the press, and the law of 16th March, 1893, giving the French government special powers with regard to foreign newspapers, or newspapers published in a foreign language. Cf. Duguít, *Manuel de Droit Public français ; Droit Constitutionnel* (1907), para. 86, p. 582.



## Part II.

The Crown originally held all presses in its own hands, allowed no one to print except under special license, and kept all presses subject to regulations put forward by the Star Chamber in virtue of the royal prerogative: the exclusive privilege of printing was thus given to ninety-seven London stationers and their successors, who, as the Stationers' Company, constituted a guild with power to seize all publications issued by outsiders; the printing-presses ultimately conceded to the Universities existed only by a decree of the Star Chamber.

Side by side with the restrictions on printing—which appear to have more or less broken down—there grew up a system of licensing which constituted a true censorship.<sup>1</sup>

Press offences constituted a special class of crimes cognisable by a special tribunal—the Star Chamber—which sat without a jury and administered severe punishments.<sup>2</sup> The Star Chamber indeed fell in 1641, never to be revived, but the censorship survived the Commonwealth, and was under the Restoration (1662) given a strictly legal foundation by the Licensing Act of 1662, which by subsequent enactments was kept in force till 1695.<sup>3</sup>

Original  
likeness  
and subse-  
quent un-  
likeness  
between  
press law  
of England  
and of  
France.

There existed, in short, in England during the sixteenth and seventeenth centuries every method of curbing the press which was then practised in France,

<sup>1</sup> See for the control exercised over the press down to 1695, Odgers, *Libel and Slander* (3rd ed., 1896), pp. 10-13; Holdsworth, *History of English Law*, vol. vi (1924), pp. 360-379, and vol. x (1938), pp. 28, 29.

<sup>2</sup> Gardiner, *History of England*, vol. vii (1884), pp. 51, 130; *ibid.*, vol. viii (1884), pp. 225, 234; Holdsworth, *op. cit.*, vol. vi (1924), pp. 367-370.

<sup>3</sup> See Macaulay, *History of England*, vol. iv (1858), ch. xix, xxi.

and which has prevailed there almost up to the present day. In England, as on the Continent, the book trade was a monopoly, the censorship was in full vigour, the offences of authors and printers were treated as special crimes and severely punished by special tribunals. This similarity or identity of the principles with regard to the treatment of literature originally upheld by the government of England and by the government of France is striking. It is rendered still more startling by the contrast between the subsequent history of legislation in the two countries. In France (as we have already seen) the censorship, though frequently abolished, has almost as frequently been restored. In England the system of licensing, which was the censorship under another name, was terminated rather than abolished in 1695. The House of Commons, which refused to continue the Licensing Act, was certainly not imbued with any settled enthusiasm for liberty of thought. The English statesmen of 1695 neither avowed nor entertained the belief that the "free communication of thoughts and opinions was one of the most valuable of the rights of man."<sup>1</sup> They refused to renew the Licensing Act, and thus established freedom of the press without any knowledge of the importance of what they were doing. This can be asserted with confidence, for the Commons delivered to the Lords a document which contains the reasons for their refusing to renew the Act.

"This paper completely vindicates the resolution to which the Commons had come. But it proves at the same time that they knew not what they

<sup>1</sup> See *Declaration of the Rights of Man*, art. 11, p. 234, *ante*.

## Part II.

“ were doing, what a revolution they were making,  
 “ what a power they were calling into existence.  
 “ They pointed out concisely, clearly, forcibly, and  
 “ sometimes with a grave irony which is not un-  
 “ becoming, the absurdities and iniquities of the  
 “ statute which was about to expire. But all their  
 “ objections will be found to relate to matters of  
 “ detail. On the great question of principle, on the  
 “ question whether the liberty of unlicensed printing  
 “ be, on the whole, a blessing or a curse to society,  
 “ not a word is said. The Licensing Act is con-  
 “ demned, not as a thing essentially evil, but on  
 “ account of the petty grievances, the exactions, the  
 “ jobs, the commercial restrictions, the domiciliary  
 “ visits, which were incidental to it. It is pronounced  
 “ mischievous because it enables the Company of  
 “ Stationers to extort money from publishers, because  
 “ it empowers the agents of the government to search  
 “ houses under the authority of general warrants,  
 “ because it confines the foreign book trade to the  
 “ port of London; because it detains valuable  
 “ packages of books at the Custom House till the  
 “ pages are mildewed. The Commons complain that  
 “ the amount of the fee which the licenser may  
 “ demand is not fixed. They complain that it is  
 “ made penal in an officer of the Customs to open a  
 “ box of books from abroad, except in the presence  
 “ of one of the censors of the press. How, it is  
 “ very sensibly asked, is the officer to know that  
 “ there are books in the box till he has opened it?  
 “ Such were the arguments which did what Milton’s  
 “ *Areopagitica* had failed to do.”<sup>1</sup>

<sup>1</sup> Macaulay, *op. cit.*, vol. iv (1858), p. 543.

How slight was the hold of the principle of the liberty of the press on the statesmen who abolished the censorship is proved by their entertaining, two years later, a bill (which, however, never passed) to prohibit the unlicensed publication of news.<sup>1</sup> Yet while the solemn declaration by the National Assembly of 1789 of the right to the free expression of thought remained a dead letter, or at best a speculative maxim of French jurisprudence which, though not without influence, was constantly broken in upon by the actual law of France, the refusal of the English Parliament in 1695 to renew the Licensing Act did permanently establish the freedom of the press in England. The fifty years which followed were a period of revolutionary disquiet fairly comparable with the era of the Restoration in France. But the censorship once abolished in England was never revived, and all idea of restrictions on the liberty of the press other than those contained in the law of libel have been so long unknown to Englishmen, that the rare survivals in our law of the notion that literature ought to be controlled by the state appear to most persons inexplicable anomalies, and are tolerated only because they produce so little inconvenience that their existence is forgotten.

To a student who surveys the history of the liberty of the press in France and in England two questions suggest themselves. How does it happen that down to the end of the seventeenth century the principles upheld by the Crown in each country were in substance the same? What, again, is the explanation of the fact that from the beginning of the eighteenth

Questions suggested by original similarity and final difference between press law of France and of England.

<sup>1</sup> Macaulay, *op. cit.*, pp. 774, 775.

Part II. century the principles governing the law of the press in the two countries have been, as they still continue to be, essentially different? The similarity and the difference each seems at first sight equally perplexing. Yet both one and the other admit of explanation, and the solution of an apparent paradox is worth giving because of its close bearing on the subject of this lecture, namely, the predominance of the spirit of legality which distinguishes the law of the constitution.

Reasons  
for original  
similarity.

The ground of the similarity between the press law of England and of France, from the beginning of the sixteenth till the beginning of the eighteenth century, is that the governments, if not the people, of each country were during that period influenced by very similar administrative notions and by similar ideas as to the relation between the state and individuals. In England, again, as in every European country, the belief prevailed that a King was responsible for the religious belief of his subjects. This responsibility involves the necessity for regulating the utterance and formation of opinion. But this direction or control cannot be exercised without governmental interference with that liberty of the press which is at bottom the right of every man to print any opinion which he chooses to propagate, subject only to risk of punishment if his expressions contravene some distinct legal maxim. During the sixteenth and seventeenth centuries, in short, the Crown was in England, as in France, extending its administrative powers; the Crown was in England, as in France, entitled, or rather required by public opinion, to treat the control of literature as an affair



of state. Similar circumstances produced similar results; in each country the same principles prevailed; in each country the treatment of the press assumed, therefore, a similar character.

The reason, again, why, for nearly two centuries, the press has been treated in France on principles utterly different from those which have been accepted in England, lies deep in the difference of the spirit which has governed the customs and laws of the two countries.

Reasons for  
later dis-  
similarity.

In France the idea has always flourished that the government, whether Royal, Imperial, or Republican, possesses, as representing the state, rights and powers as against individuals superior to and independent of the ordinary law of the land. This is the real basis of that whole theory of a *droit administratif*,<sup>1</sup> which it is so hard for Englishmen fully to understand. The increase, moreover, in the authority of the central government has at most periods both before and since the Revolution been, or appeared to most Frenchmen to be, the means of removing evils which oppressed the mass of the people. The nation has in general looked upon the authority of the state with the same favour with which Englishmen during the sixteenth century regarded the prerogative of the Crown. The control exercised in different forms by the executive over literature has, therefore, in the main fully harmonised with the other institutions of France. The existence, moreover, of an elaborate administrative system, the action of which has never been subject to the control of the ordinary tribunals, has always placed in the hands of whatever power was supreme

<sup>1</sup> Cf. App. sec. i (4), p. 497.

Part II. in France the means of enforcing official surveillance of literature. Hence the censorship (to speak of no other modes of checking the liberty of the press) has been on the whole in keeping with the general action of French governments and with the average sentiment of the nation, whilst there has never been wanting appropriate machinery by which to carry the censorship into effect.

No doubt there were heard throughout the eighteenth century, and have been heard ever since, vigorous protests against the censorship, as against other forms of administrative arbitrariness; and at the beginning of the Great Revolution, as at other periods since, efforts were made in favour of free discussion. Hence flowed the abolition of the censorship, but this attempt to limit the powers of the government in one particular direction was quite out of harmony with the general reverence for the authority of the state. As long, moreover, as the whole scheme of French administration was left in force, the government, in whatever hands it was placed, always retained the means of resuming its control over the press, whenever popular feeling should for a moment favour the repression of free speech. Hence arose the constantly recurring restoration of the abolished censorship or of restraints which, though not called by the unpopular name of *la censure*, were more stringent than has ever been any Licensing Act. Restrictions, in short, on what Englishmen understand by the liberty of the press have continued to exist in France and are hardly now abolished, because the exercise of preventive and discretionary authority on the part of the executive harmonises with the general spirit of

French law, and because the administrative machinery, which is the creation of that spirit, has always placed (as it still places) in the hands of the executive the proper means for enforcing discretionary authority.

In England, on the other hand, the attempt made by the Crown during the sixteenth and seventeenth centuries to form a strong central administration, though it was for a time attended with success, because it met some of the needs of the age, was at bottom repugnant to the manners and traditions of the country; and even at a time when the people wished the Crown to be strong, they hardly liked the means by which the Crown exerted its strength.

Hundreds of Englishmen who hated toleration and cared little for freedom of speech, entertained a keen jealousy of arbitrary power, and a fixed determination to be ruled in accordance with the law of the land.<sup>1</sup> These sentiments abolished the Star Chamber in 1641, and made the re-establishment of the hated Court impossible even for the frantic loyalty of 1660. But the destruction of the Star Chamber meant much more than the abolition of an unpopular tribunal; it meant the rooting up from its foundations of the whole of the administrative system which had been erected by the Tudors and extended by the Stuarts. This overthrow of a form of administration which contradicted the legal habits of Englishmen had no direct connection with any desire for the uncontrolled expression of opinion. The Parliament which would not restore the Star Chamber or the Court of High

<sup>1</sup> See Selden's remarks on the illegality of the decrees of the Star Chamber, cited Gardiner, *History of England*, vol. vii (1884), p. 51.

Part II. Commission passed the Licensing Act, and this statute, which in fact establishes the censorship, was, as we have seen, continued in force for some years after the Revolution. The passing, however, of the statute, though not a triumph of toleration, was a triumph of legality. The power of licensing depended henceforward, not on any idea of inherent executive authority, but on the statute law. The right of licensing was left in the hands of the government, but this power was regulated by the words of a statute; and, what was of more consequence, breaches of the Act could be punished only by proceedings in the ordinary courts. The fall of the Star Chamber deprived the executive of the means for exercising arbitrary power.<sup>1</sup> Hence the refusal of the House of Commons in 1695 to continue the Licensing Act was something very different from the proclamation of freedom of thought contained in the French Declaration of Rights, or from any of the laws which have abolished the censorship in France. To abolish the right of the government to control the press, was, in England, simply to do away with an exceptional authority, which was opposed to the general tendency of the law, and the abolition was final, because the executive had already lost the means by which the control of opinion could be effectively enforced.

To sum the whole matter up, the censorship though constantly abolished has been constantly revived in France, because the exertion of discretionary powers by the government has been and still is in

<sup>1</sup> But the Council after the Restoration exercised considerable administrative power and in it are to be found the beginnings of the modern Government Departments—Ed.

harmony with French laws and institutions. The abolition of the censorship was final in England, because the exercise of discretionary power by the Crown was inconsistent with our system of administration and with the ideas of English law.<sup>1</sup> The contrast is made the more striking by the paradoxical fact, that the statesmen who tried with little success to establish the liberty of the press in France really intended to proclaim freedom of opinion, whilst the statesmen who would not pass the Licensing Act, and thereby founded the liberty of the press in England, held theories of toleration which fell far short of favouring unrestricted liberty of discussion. This contrast is not only striking in itself, but also affords the strongest illustration that can be found of English conceptions of the rule of law.

<sup>1</sup> The Bill of Rights did not destroy the discretionary powers of the Crown; it severely curtailed the more extravagant claims advanced under pretence of prerogative during the seventeenth century.—ED.



## CHAPTER VII

### THE RIGHT OF PUBLIC MEETING<sup>1</sup>

**Part II.** THE law of Belgium<sup>2</sup> with regard to public meetings is contained in the nineteenth article of the constitution, which is probably intended in the main to reproduce the law of England, and runs as follows:—

Right of public meeting.

Rules of Belgian constitution.

“*Art. 19. Les Belges ont le droit de s’assembler paisiblement et sans armes, en se conformant aux lois, qui peuvent régler l’exercice de ce droit, sans néanmoins le soumettre à une autorisation préalable.*”

“*Cette disposition ne s’applique point aux rassemblements en plein air, qui restent entièrement soumis aux lois de police.*”<sup>3</sup>

Principles of English law as to right of public meeting.

The restrictions on the practice of public meeting appear to be more stringent in Belgium than in England, for the police have with us no special authority to control open-air assemblies. Yet just as it cannot with strict accuracy be asserted that

<sup>1</sup> The author referred to Stephen, *Commentaries* (14th ed., 1903), vol. iv, pp. 174-178, and Kenny, *Outlines of Criminal Law* (3rd ed., 1907), pp. 280-286, on this subject. See App. sec. ii (1) for a statement of the present law.—ED.

<sup>2</sup> See *Law Quarterly Review*, vol. iv (1888), p. 159. See also as to right of public meeting in Italy, *ibid.* p. 78; in France, *ibid.* p. 165; in Switzerland, *ibid.* p. 169; in United States, *ibid.* p. 257. See as to history of law of public meeting in France, Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 83, pp. 554-559.

<sup>3</sup> *Constitution de la Belgique*, art. 19.

English law recognises the liberty of the press, so it can hardly be said that our constitution knows of such a thing as any specific right of public meeting. No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing *A*, *B*, and *C* to meet together either in the open air or elsewhere for a lawful purpose, but the right of *A* to go where he pleases so that he does not commit a trespass, and to say what he likes to *B* so that his talk is not libellous or seditious, the right of *B* to do the like, and the existence of the same rights of *C*, *D*, *E*, and *F*, and so on *ad infinitum*, lead to the consequence that *A*, *B*, *C*, *D*, and a thousand or ten thousand other persons, may (as a general rule)<sup>1</sup> meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner. *A* has a right to walk down the High Street or to go on to a common. *B* has the same right. *C*, *D*, and all their friends have the same right to go there also. In other words, *A*, *B*, *C*, and *D*, and ten thousand such, have a right to hold a public meeting; and as *A* may say to *B* that he thinks an Act ought to be passed abolishing the House of Lords, or that the House of Lords are bound to reject any bill modifying the constitution

<sup>1</sup> No opinion is expressed here on the point whether an agreement on the part of *A*, *B*, and *C* to meet together may not under exceptional circumstances be a conspiracy.

**Part II.** of their House, and as *B* may make the same remark to any of his friends, the result ensues that *A* and ten thousand more may hold a public meeting either to support the government or to encourage the resistance of the Peers. Here then you have in substance that right of public meeting for political and other purposes which is constantly treated in foreign countries as a special privilege, to be exercised only subject to careful restrictions. The assertion, however, that *A*, *B*, *C*, and *D*, and a hundred thousand more persons, just because they may each go where they like, and each say what they please, have a right to hold meetings for the discussion of political and other topics, does not of course mean that it is impossible for persons so to exercise the right of meeting as to break the law. The object of a meeting may be to commit a crime by open force, or in some way or other to break the peace, in which case the meeting itself becomes an unlawful assembly.<sup>1</sup> The mode in which a meeting is held may threaten a breach of the peace on the part of those holding the meeting, and therefore inspire peaceable citizens with reasonable fear; in which case, again, the meeting will be unlawful. In either instance the meeting may lawfully be broken up, and the members of it expose themselves to all the consequences, in the way of arrest, prosecution, and punishment, which attend the doing of unlawful acts, or, in other words, the commission of crimes.<sup>2</sup>

<sup>1</sup> See App. sec. ii, (1) (A), for a criticism of the author's view.

<sup>2</sup> Compare App. sec. ii, (1) (A), p. 548, for a criticism of the author's assumption that the right of public meeting rests upon the ipants refraining from committing the misdemeanour of unlawfully.

Chapter  
VII.

Meeting  
not unlaw-  
ful because  
it will  
excite un-  
lawful  
opposition.

A public meeting which, from the conduct of those engaged in it, as, for example, through their marching together in arms, or through their intention to excite a breach of the peace on the part of opponents,<sup>1</sup> fills peaceable citizens with reasonable fear that the peace will be broken, is an unlawful assembly. But a meeting which is not otherwise illegal does not<sup>2</sup> become an unlawful assembly solely because it will excite violent and unlawful opposition, and thus may indirectly lead to a breach of the peace. Suppose, for example, that the members of the Salvation Army propose to hold a meeting at Oxford, suppose that a so-called Skeleton Army announce that they will attack the Salvationists and disperse them by force, suppose, lastly, that thereupon peaceable citizens who do not like the quiet of the town to be disturbed and who dread riots, urge the magistrates to stop the meeting of the Salvationists. This may seem at first sight a reasonable request, but the magistrates cannot, it is submitted,<sup>3</sup> legally take the course suggested to them. That under the present state of the law this must be so is on reflection pretty clear. The right of *A* to walk down the High Street is not, as a rule,<sup>4</sup> taken away by the threat of *X* to knock *A* down if *A*

<sup>1</sup> Cf. *O'Kelly v. Harvey* (1883) 14 L.R. Ir. 105; *Humphries v. Connor* (1864) 17 Ir. C.L.R. 1, at pp. 8, 9, per Fitzgerald, J.

<sup>2</sup> This statement must be read subject to the limitations stated, pp. 277, 278, *post*.

<sup>3</sup> It is assumed that the Salvationists meet together, as they certainly do, for a lawful purpose, and meet quite peaceably, and without any intent either themselves to break the peace or to incite others to a breach thereof. The magistrates, however, could require the members of the Skeleton Army, or perhaps even the members of the Salvation Army, to find sureties for good behaviour or to keep the peace. Cf. Kenny, *Outlines of Criminal Law* (3rd ed., 1907), pp. 282, 486; *Wise v. Dunning* [1902] 1 K.B. 167; K. & L. 357.

<sup>4</sup> See p. 282, *post*, and cf. *Humphries v. Connor*, *ante*.

Part II. takes his proposed walk. It is true, that *A*'s going into the High Street may lead to a breach of the peace, but *A* no more causes the breach of the peace than a man whose pocket is picked causes the theft by wearing a watch. *A* is the victim, not the author of a breach of the law. Now, if the right of *A* to walk down the High Street is not affected by the threats of *X*, the right of *A*, *B*, and *C* to march down the High Street together is not diminished by the proclamation of *X*, *Y*, and *Z* that they will not suffer *A*, *B*, and *C* to take their walk. Nor does it make any difference that *A*, *B*, and *C* call themselves the Salvation Army, or that *X*, *Y*, and *Z* call themselves the Skeleton Army. The plain principle is that *A*'s right to do a lawful act, namely, walk down the High Street, cannot be diminished by *X*'s threat to do an unlawful act, namely, to knock *A* down. This is the principle established, or rather illustrated, by the case of *Beatty v. Gillbanks*.<sup>1</sup> The Salvation Army met together at Weston-super-Mare with the knowledge that they would be opposed by the Skeleton Army. The magistrates had put out a notice intended to forbid the meeting. The Salvationists, however, assembled, were met by the police, and told to obey the notice. *X*, one of the members, declined to obey and was arrested. He was subsequently, with others, convicted by the magistrates on a summary charge of unlawfully assembling in breach of the peace in a public thoroughfare and bound over

<sup>1</sup> (1882) 9 Q.B.D. 308; K. & L. 354. Cf. *Duncan v. Jones* [1936] 1 K.B. 218, which shows that it is an offence for anybody to resist the order of a constable to move on from the place of a meeting, if in the opinion of the constable, based on reasonable grounds, such an order is necessary to prevent a breach of the peace.—Ed.



to keep the peace. It was an undoubted fact that the meeting of the Salvation Army was likely to lead to an attack by the Skeleton Army, and in this sense cause a breach of the peace. The conviction, however, of X by the magistrates was quashed on appeal to the Queen's Bench Division.

"What has happened here," says Field, J., "is that an unlawful organisation [the Skeleton Army] has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition."<sup>1</sup>

The principle here laid down is thus expressed by an Irish judge in a case which has itself received the approval of the English King's Bench Division.<sup>2</sup>

"Much has been said on both sides in the course of the argument about the case of *Beatty v. Gillbanks*. I am not sure that I would have taken the same view of the facts of that case as was adopted by the court that decided it; but I agree with both the law as laid down by the judges, and their application of it to the

<sup>1</sup> *Beatty v. Gillbanks*, ante, at p. 314; *Beatty v. Glenister* (1884) W.N. 93; *The Queen v. Justices of Londonderry* (1891) 28 L.R. Ir. 440; with which contrast *Wise v. Dunning* [1902] 1 K.B. 167; K. & L. 357; and the Irish cases, *Humphries v. Connor* (1864) 17 Ir. C.L.R. 1; *The Queen v. M'Naughten* (1881) 14 Cox C.C. 576; *O'Kelly v. Harvey* (1883) 14 L.R. Ir. 105.

It is to be noted that the King's Bench Division in deciding *Wise v. Dunning* did not mean to overrule *Beatty v. Gillbanks*, and apparently conceived that they were following *The Queen v. Justices of Londonderry*.

<sup>2</sup> See *The Queen v. Justices of Londonderry*, ante, and *Wise v. Dunning*, ante, at p. 179, per Darling, J.

## Part II.

“ facts as they understood them. The principle underlying the decision seems to me to be that an act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way.”<sup>1</sup>

Nor is it in general an answer to the claim of, *e.g.* the Salvationists, to exercise their right of meeting, that whilst such exercise may excite wrongdoers to break the peace, the easiest way of keeping it is to prevent the meeting, for “if danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights.”<sup>2</sup>

The principle, then, that a meeting otherwise in every respect lawful and peaceable is not rendered unlawful merely by the possible or probable misconduct of wrongdoers, who to prevent the meeting are determined to break the peace, is, it is submitted,<sup>3</sup>

<sup>1</sup> *The Queen v. Justices of Londonderry*, ante, at p. 461, per Holmes, J.

<sup>2</sup> *Ibid.*, at p. 450, per O'Brien, J.

<sup>3</sup> *Wise v. Dunning*, ante, or rather some expressions used in the judgments in that case, may undoubtedly be cited as laying down the broader rule, that a public meeting in itself lawful, and carried on, so far as the promoters and the members of it are concerned, perfectly peaceably, may become unlawful solely because the natural consequence of the meeting will be to produce an unlawful act, viz. a breach of the peace on the part of opponents (see pp. 175, 176, per Alverstone, C.J.; p. 178, per Darling, J.; pp. 179, 180, per Channell, J.). It should be noted, however, that *Wise v. Dunning* has reference, not to the circumstances under which a meeting becomes an unlawful assembly, but to the different question, what are the circumstances under which a

well established, whence it follows that in general an otherwise lawful public meeting cannot be forbidden or broken up by the magistrates simply because the meeting may probably or naturally lead to a breach of the peace on the part of wrongdoers.

To the application of this principle there exist certain limitations or exceptions. They are grounded on the absolute necessity for preserving the King's peace.

*First limitation.*—If there is anything unlawful in the conduct of the persons convening or addressing a meeting, and the illegality is of a kind which naturally provokes opponents to a breach of the peace, the speakers at and the members of the meeting may be held to cause the breach of the peace, and the meeting itself may thus become an unlawful meeting. If, for example, a Protestant controversialist surrounded by his friends uses in some public place where there is a large Roman Catholic population, abusive language which is in fact slanderous of Roman Catholics, or which he is by a local by-law forbidden to use in the streets, and thereby provokes a mob of Roman Catholics to break the peace, the meeting may become an unlawful assembly. And the same result may ensue where, though there is nothing in the mode in which the meeting is carried on which provokes a breach of the peace, yet the object of the meeting is in itself not strictly lawful, and may therefore excite opponents to a breach of the peace.<sup>1</sup>

(1) Where illegality in meeting provokes breach of peace.

person may be required to find sureties for good behaviour? The magistrate had held that Wise's language had been provocative and that it was likely to occur again. Large crowds had assembled and a serious riot was only prevented by police interference; p. 178.

<sup>1</sup> Cf. *Wise v. Dunning*, ante, and *O'Kelly v. Harvey*, ante.

## Part II.

(2) Where meeting lawful but peace can only be kept by dispersing it.

*Second limitation.*—Where a public meeting, though the object of the meeting and the conduct of the members thereof are strictly lawful, provokes a breach of the peace, and it is impossible to preserve or restore the peace by any other means than by dispersing the meeting, then magistrates, constables, and other persons in authority may call upon the meeting to disperse, and, if the meeting does not disperse, it becomes an unlawful assembly.<sup>1</sup> Let us suppose, for example, that the Salvation Army hold a meeting at Oxford, that a so-called Skeleton Army come together with a view to preventing the Salvationists from assembling, and that it is in strictness impossible for the peace to be preserved by any other means than by requiring the Salvationists to disperse. Under these circumstances, though the meeting of the Salvation Army is in itself perfectly lawful, and though the wrongdoers are the members of the Skeleton Army, yet the magistrates may, it would seem, if they can in no other way preserve the peace, require the Salvationists to disperse, and if the Salvationists do not do so, the meeting becomes an unlawful assembly; and it is possible that, if the magistrates have no other means of preserving the peace, *i.e.* cannot protect the Salvationists from attack by the Skeleton Army, they may lawfully prevent the Salvationists from holding the meeting.<sup>2</sup> But the only justification for prevent-

<sup>1</sup> See especially *O'Kelly v. Harvey*, *ante*.

<sup>2</sup> It is particularly to be noted that in *O'Kelly v. Harvey*, *ante*, the case in which is carried furthest the right of magistrates to preserve the peace by dispersing a lawful meeting, X, the magistrate against whom an action for assault was brought, believed that there would be a breach of the peace if the meeting broken up continued assembled, and that there was no other way by which the breach of the peace could be avoided but by stopping and dispersing the meeting. *Ibid.*, at p. 109, per Law, L.C.

ing the Salvationists from exercising their legal rights is the *necessity of the case*. If the peace can be preserved, not by breaking up an otherwise lawful meeting, but by arresting the wrongdoers—in this case the Skeleton Army—the magistrates or constables are bound, it is submitted, to arrest the wrongdoers and to protect the Salvationists in the exercise of their lawful rights.<sup>1</sup>

One point, however, deserves special notice since it is apt to be overlooked.

The limitations or restrictions which arise from the paramount necessity for preserving the King's peace are, whatever their extent,—and as to their exact extent some fair doubt exists,—in reality nothing else than restraints, which, for the sake of preserving the peace, are imposed upon the ordinary freedom of individuals.

Limitations on right of public meeting are really limitations on individual freedom.

Thus if *A*, a religious controversialist, acting alone and unaccompanied by friends and supporters, addresses the public in, say, the streets of Liverpool, and uses language which is defamatory or abusive, or, without being guilty of defamation, uses terms of abuse which he is by a local by-law forbidden to use in the streets, and thereby, as a natural result of his oratory, excites his opponents to a breach of the peace, he may be held liable for the wrongful acts of which his language is the cause though not the legal justification, and this though he does not himself break the peace, nor intend to cause others to violate it. He may, certainly, be called upon to find sureties for his good behaviour, and he may, probably, be prevented by the police from continuing addresses which

<sup>1</sup> This is particularly well brought out in *O'Kelly v. Harvey*, *ante*.



Part II. are exciting a breach of the peace, for "the cases with  
"respect to apprehended breaches of the peace show  
"that the law does regard the infirmity of human  
"temper to the extent of considering that a breach of  
"the peace, although an illegal act, may be the natural  
"consequence of insulting or abusive language or  
"conduct."<sup>1</sup>

So again it may, where the public peace cannot otherwise be preserved, be lawful to interfere with the legal rights of an individual and to prevent him from pursuing a course which in itself is perfectly legal. Thus *A*, a zealous Protestant lady, walks through a crowd of Roman Catholics wearing a party emblem, namely, an orange lily, which under the circumstances of the case is certain to excite, and does excite, the anger of the mob. She has no intention of provoking a breach of the peace, she is doing nothing which is in itself unlawful; she exposes herself, however, to insult, and to pressing danger of public attack. A riot has begun; *X*, a constable who has no other means of protecting *A*, or of restoring the peace, requests her to remove the lily. She refuses to do so. He then, without use of any needless force, removes the flower and thereby restores the peace. The conduct of *X* is apparently legal, and *A* has no ground of action for what would otherwise have been an assault. The legal vindication of *X*'s conduct is not that *A* was a wrongdoer, or that the rioters were within their rights, but that the King's peace could not be restored without compelling *A* to remove the lily.<sup>2</sup>

<sup>1</sup> *Wise v. Dunning* [1902] 1 K.B. 167, at pp. 179, 180, per Channell, J.

<sup>2</sup> *Humphries v. Connor* (1864) 17 Ir. C.L.R. 1. The case is very noticeable; it carries the right of magistrates or constables to interfere with the legal conduct of *A*, for the sake of preventing or terminat-

No public meeting, further, which would not otherwise be illegal, becomes so (unless in virtue of some special Act of Parliament) in consequence of any proclamation or notice by a Secretary of State, by a magistrate, or by any other official. Suppose, for example, that the Salvationists advertise throughout the town that they intend holding a meeting in a field which they have hired near Oxford, that they intend to assemble in St. Giles's and march thence with banners flying and bands playing to their proposed place of worship. Suppose that the Home Secretary thinks that, for one reason or another, it is undesirable that the meeting should take place, and serves formal notice upon every member of the army, or on the officers who are going to conduct the so-called "campaign" at Oxford, that the gathering must not take place. This notice does not alter the character of the meeting, though, if the meeting be illegal, the notice makes any one who reads it aware of the character of the assembly, and thus affects his responsibility for attending it.<sup>1</sup> Assume that the

Meeting  
not made  
unlawful  
by official  
proclama-  
tion of its  
illegality.

ing a breach of the peace by X, to its very furthest extent. The interference, if justifiable at all, can be justified only by necessity, and an eminent Irish judge (Fitzgerald, J., 17 Ir. C.L.R., at pp. 8, 9) doubted whether it was not in this case carried too far. "I do not see where we are to draw the line. If [X] is at liberty to take a lily from one person [A] because the wearing of it is displeasing to others, who may make it an excuse for a breach of the peace, where are we to stop? It seems to me that we are making, not the law of the land, but the law of the mob supreme, and recognising in constables a power of interference with the rights of the Queen's subjects, which, if carried into effect to the full extent of the principle, might be accompanied by constitutional danger. If it had been alleged that the lady wore the emblem with an intent to provoke a breach of the peace, it would render her a wrongdoer; and she might be chargeable as a person creating a breach of the peace," but compare *Duncan v. Jones* [1936] 1 K.B. 218 and E. C. S. Wade in *Cambridge Law Journal* (1937), vol. vi, "Police Powers and Public Meetings," at pp. 175 et seq.

<sup>1</sup> *The King v. Furse* (1833) 6 Car. & P. 81.

## Part II.

meeting would have been lawful if the notice had not been issued, and it certainly will not become unlawful because a Secretary of State has forbidden it to take place. The proclamation has under these circumstances as little legal effect as would have a proclamation from the Home Office forbidding me or any other person to walk down the High Street. It follows, therefore, that the government has little or no power of preventing meetings which to all appearance are lawful, even though they may in fact turn out when actually convened to be unlawful because of the mode in which they are conducted. This is certainly a singular instance of the way in which adherence to the principle that the proper function of the state is the punishment, not the prevention, of crimes, deprives the executive of discretionary authority.

Meeting may be lawful though its holding contrary to public interest.

A meeting, lastly, may be lawful which, nevertheless, any wise or public-spirited person would hesitate to convene. For *A*, *B*, and *C* may have a right to hold a meeting, although their doing so will as a matter of fact probably excite opponents to deeds of violence, and possibly produce bloodshed. Suppose a Protestant zealot were to convene a meeting for the purpose of denouncing the evils of the confessional, and were to choose as the scene of the open-air gathering some public place where meetings were usually held in the midst of a large town filled with a population of Roman Catholic poor. The meeting would, it is conceived, be lawful, but no one can doubt that it might provoke violence on the part of opponents. Neither the government, however, nor the magistrates could (it is submitted), as a rule, at any rate, prohibit and prevent the meeting from

taking place. They might, it would seem, prevent the meeting if the Protestant controversialist and his friends intended to pursue a course of conduct, *e.g.* to give utterance to libellous abuse, which would be both illegal and might naturally produce a breach of the peace, or if the circumstances were such that the peace could not be preserved otherwise than by preventing the meeting.<sup>1</sup> But neither the government nor the magistrates can, it is submitted, solely on the ground that a public meeting may provoke wrongdoers to a breach of the peace, prevent loyal citizens from meeting together peaceably and for a lawful purpose. Of the policy or of the impolicy of denying to the highest authority in the state very wide power to take in their discretion precautionary measures against the evils which may flow from the injudicious exercise of legal rights, it is unnecessary here to say anything. The matter which is worth notice is the way in which the rules as to the right of public meeting illustrate both the legal spirit of our institutions and the process by which the decisions of the courts as to the rights of individuals have in effect made the right of public meeting a part of the law of the constitution.

<sup>1</sup> See p. 273, *ante*, and compare *O'Kelly v. Harvey* (1883) 14 L.R. Ir. 105, with *The Queen v. Justices of Londonderry* (1891) 28 L.R. Ir. 440, and *Wise v. Dunning* [1902] 1 K.B. 167; K. & L. 357, with *Beatty v. Gillbanks* (1882) 9 Q.B.D. 308; K. & L. 354. And the magistrates might probably bind over the conveners of the meeting to find sureties for their good behaviour. The law on this point may, it appears, be thus summed up: "Even a person who has not actually committed any offence at all may be required to find sureties for good behaviour, or to keep the peace, if there be reasonable grounds to fear that he may commit some offence, or may incite others to do so, or even that he may act in some manner which would naturally tend to induce other people (even against his desire) to commit one."—Kenny, *Outlines of Criminal Law* (15th ed., G. G. Phillips, 1936), pp. 582, 583.

## CHAPTER VIII

### MARTIAL LAW <sup>1</sup>

**Part II** THE rights already treated of in the foregoing chapter, as for example the right to personal freedom or the right to free expression of opinion, do not, it may be suggested, properly belong to the province of constitutional law at all, but form part either of private law strictly so called, or of the ordinary criminal law. Thus *A*'s right to personal freedom is, it may be said, only the right of *A* not to be assaulted, or imprisoned, by *X*, or (to look at the same thing from another point of view) is nothing else than the right of *A*, if assaulted by *X*, to bring an action against *X*, or to have *X* punished as a criminal for the assault. Now in this suggestion there lies an element of important truth, yet it is also undoubted that the right to personal freedom, the right to free discussion, and the like, appear in the forefront of many written constitutions, and are in fact the chief advantages which

No sharp line can be drawn between rules of private law or of criminal law and constitutional law.

<sup>1</sup> See Forsyth, *Cases and Opinions in Constitutional Law* (1869), ch. vi, and Appendix; Stephen, *History of the Criminal Law* (1883), vol. i, pp. 201-216; *The King v. Pinney* (1832) 5 Car. & P. 254; K. & L. 363; *The Queen v. Vincent* (1839) 9 Car. & P. 91; *The Queen v. Neale* (1839) 9 Car. & P. 431; Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933), pp. 368-381, especially for later Irish cases; *Law Quarterly Review*, vol. xviii (1902), pp. 117-151, for four articles on the subject.



citizens hope to gain by the change from a despotic to a constitutional form of government.

The truth is that these rights may be looked upon from two points of view. They may be considered simply parts of private or, it may be, of criminal law ; thus the right to personal freedom may, as already pointed out, be looked at as the right of *A* not to have the control of his body interfered with by *X*. But in so far as these rights hold good against the governing body in the state, or in other words, in so far as these rights determine the relation of individual citizens towards the executive, they are part, and a most important part, of the law of the constitution.

Now the noticeable point is that in England the rights of citizens as against each other are (speaking generally) the same as the rights of citizens against any servant of the Crown. This is the significance of the assertion that in this country the law of the constitution is part of the ordinary law of the land. The fact that a Secretary of State cannot at his discretion and for reasons of state arrest, imprison, or punish any man, except, of course, where special powers are conferred upon him by statute, as by an Aliens Act or by an Extradition Act, is simply a result of the principle that a Secretary of State is governed in his official as in his private conduct by the ordinary law of the realm. Were the Home Secretary to assault the leader of the Opposition in a fit of anger, or were the Home Secretary to arrest him because he thought his political opponent's freedom dangerous to the state, the Secretary of State would in either case be liable to an action, and all other penalties to which a person exposes himself by committing an assault.

**Part II.** The fact that the arrest of an influential politician whose speeches might excite disturbance was a strictly administrative act would afford no defence to the Minister or to the constables who obeyed his orders.

The subjects treated of in this chapter and in the next three chapters clearly belong to the field of constitutional law, and no one would think of objecting to their treatment in a work on the law of the constitution that they are really part of private law. Yet, if the matter be looked at carefully, it will be found that, just as rules which at first sight seem to belong to the domain of private law are in reality the foundation of constitutional principles, so topics which appear to belong manifestly to the law of constitution depend with us at bottom on the principles of private or of criminal law. Thus the position of a soldier is in England governed, as we shall see, by the principle, that though a soldier is subject to special liabilities in his military capacity, he remains while in the ranks, as he was when out of them, subject to all the liabilities of an ordinary citizen. So, from a legal point of view, ministerial responsibility is simply one application of the doctrine which pervades English law,<sup>1</sup> that no one can plead the command of a superior, were it the order of the Crown itself, in defence of conduct otherwise not justified by law.

Turn the matter which way you will, you come back to the all-important consideration on which we have already dwelt, that whereas under many foreign constitutions the rights of individuals flow, or appear to flow, from the articles of the constitution, in England the law of the constitution is the result, not the

<sup>1</sup> Mommsen, *Abriß des römischen Staatsrecht* (1893), p. 672.

source of the rights of individuals.<sup>1</sup> It becomes, too, more and more apparent that the means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of "equality before the law," which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and, secondly, of "personal responsibility of wrongdoers," which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors; the legal dogma, as old at least as the time of Edward the Fourth, that, if any man arrest another without lawful warrant, even by the King's command, he shall not be excused, but shall be liable to an action for false imprisonment, is not a special limitation imposed upon the royal prerogative, but the application to acts done under royal orders of that principle of individual responsibility which runs through the whole law of torts.<sup>2</sup>

"Martial law,"<sup>3</sup> in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England.<sup>4</sup> We have nothing equivalent to what is called in France the "Declaration of the State of Siege,"<sup>5</sup> under which the authority ordinarily

Martial  
Law.

<sup>1</sup> Cf. Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 293, 294.

<sup>2</sup> See Hearn, *Government of England* (2nd ed., 1887), ch. iv; cf. Gardiner, *History of England*, vol. x (1884), pp. 144, 145.

<sup>3</sup> This statement has no reference to the law of any other country than the United Kingdom.

<sup>4</sup> See *Loi sur l'état de siège*, 9 Août, 1849, Roger et Sorel, *Codes et Lois* (1882), p. 436; *Loi 3 Avril, 1878*, art. 1, and generally Duguitt, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 76, pp. 510-513; and para. 130, p. 926. See p. 292, *post*.

Part II. vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire*). This is an unmistakable proof of the permanent supremacy of the law under our constitution.

The assertion, however, that no such thing as martial law exists under our system of government, though perfectly true, will mislead any one who does not attend carefully to the distinction between two utterly different senses in which the term "martial law" is used by English writers.

In what  
sense mar-  
tial law  
recognised  
by English  
law.

Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England. It is a power which has in itself no special connection with the existence of an armed force. The Crown has the right to put down breaches of the peace. Every subject, whether a civilian or a soldier, whether what is called a "servant of the government," such for example as a policeman, or a person in no way connected with the administration, not only has the right, but is, as a matter of legal duty,<sup>1</sup> bound to assist in putting down breaches of the peace. No doubt policemen or soldiers are the persons who, as being specially employed in the maintenance of order, are most generally called upon to suppress a riot, but it is clear that all loyal subjects are bound to take their part in the suppression of riots.

<sup>1</sup> Cf. *Miller v. Knox* (1838) 6 Scott 1. See *Report of the Committee* (including Bowen, L.J., and R. B. Haldane, Q.C.), *appointed to inquire into the Disturbances at Featherstone in 1893* [C. 7234], and see App. sec. v, *post*, for extract from the Report.

It is also clear that a soldier has, as such, no exemption from liability to the law for his conduct in restoring order. Officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position; they are, each and all of them, bound to withstand and put down breaches of the peace, such as riots and other disturbances; they are, each and all of them, authorised to employ so much force, even to the taking of life, as may be necessary for that purpose, and they are none of them entitled to use more; they are, each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force; they are each, it must be added—for this is often forgotten—liable, in theory at least, to be called to account before the courts for non-performance of their duty as citizens in putting down riots, though of course the degree and kind of energy which each is reasonably bound to exert in the maintenance of order may depend upon and differ with his position as officer, magistrate, soldier, or ordinary civilian. Whoever doubts these propositions should study the leading case of *The King v. Pinney*,<sup>1</sup> in which was fully considered the duty of the Mayor of Bristol in reference to the Reform Riots of 1831.

So accustomed have people become to fancy that the maintenance of the peace is the duty solely of soldiers or policemen, that many students will probably feel surprise on discovering, from the doctrine laid down in *The King v. Pinney*, how stringent are the obligations of a magistrate in time of tumult, and how unlimited is the amount of force which he is bound to

<sup>1</sup> (1832) 5 Car. & P. 254; K. & L. 363.



Part II. employ in support of the law. A student, further, must be on his guard against being misled, as he well might be, by the language of the Riot Act, 1714. That statute provides, in substance, that if twelve rioters continue together for an hour after a magistrate has made a proclamation to them in the terms of the Act (which proclamation is absurdly enough called reading the Riot Act) ordering them to disperse, he may command the troops to fire upon the rioters or charge them sword in hand.<sup>1</sup> This, of course, is not the language, but it is the effect of the enactment. Now the error into which an uninstructed reader is likely to fall, and into which magistrates and officers have from time to time (and notably during the Gordon riots of 1780) in fact fallen, is to suppose that the effect of the Riot Act is negative as well as positive, and that, therefore, the military cannot be employed without the fulfilment of the conditions imposed by the statute. This notion is now known to be erroneous; the occasion on which force can be employed, and the kind and degree of force which it is lawful to use in order to put down a riot, is determined by nothing else than the necessity of the case.

If, then, by martial law be meant the power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England. Even, however, as to this kind of martial law one should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately

<sup>1</sup> See Stephen, *History of the Criminal Law* (1883), vol. i, pp. 202-205.

determined by a judge and jury,<sup>1</sup> and that the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ considerably from the judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment a riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution.

Martial law is, however, more often used as the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the courts. The proclamation of martial law in this sense of the term is, as has been already pointed out,<sup>2</sup> nearly equivalent to the state of things which in France and many other foreign countries is known as the declaration of a "state of siege," and is in effect the temporary and recognised government of a country by military force. The legal aspect of this condition of affairs in states which recognise the existence of this kind of martial law can hardly be better given than by citing some of the

In what  
sense mar-  
tial law  
not recog-  
nised by  
English  
law.

<sup>1</sup> This statement does not contradict anything decided by *Marais v. General Officer Commanding* [1902] A.C. 109; K. & L. 383, nor is it inconsistent with the language used in the judgment of the Privy Council, if that language be strictly construed, as it ought to be, in accordance with the important principles that, first, a case is only an authority for what it actually decides, and, secondly, every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Moreover the courts reserve for themselves the right to decide whether the situation calls for such an exercise of military force as to justify the existence of a state of war; *The King (Garde) v. Strickland* [1921] 2 I.R. 317, at p. 329.

<sup>2</sup> See p. 287, *ante*.

## Part II.

French  
Law as to  
state of  
siege.

provisions of the law which at the present day regulates the state of siege in France :—

“7. *Aussitôt l'état de siège déclaré, les pouvoirs dont l'autorité civile était revêtue pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire.—L'autorité civile continue néanmoins à exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas dessaisie.*

“8. *Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûreté de la République, contre la constitution, contre l'ordre et la paix publique, quelle que soit la qualité des auteurs principaux et des complices.*

“9. *L'autorité militaire a le droit,—1° De faire des perquisitions, de jour et de nuit, dans le domicile des citoyens;—2° D'éloigner les repris de justice et les individus qui n'ont pas leur domicile dans les lieux, soumis à l'état de siège;—3° D'ordonner la remise des armes et munitions, et de procéder à leur recherche et à leur enlèvement;—4° D'interdire les publications et les réunions qu'elle juge de nature à exciter ou à entretenir le désordre.”<sup>1</sup>*

We may reasonably, however, conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris, or some other part of France, is declared in a state of siege, and, to use a significant expression known to some continental countries, “the constitutional guarantees are suspended.” We shall hardly go far wrong if we assume that, during this suspension of ordinary law, any man whatever is liable

<sup>1</sup> Roger et Sorel, *Codes et Lois usuelles* (1882), v° état de siège, pp. 435, 436.

to arrest, imprisonment, or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war. However this may be, it is clear that in France, even under the present Republican government, the suspension of law involved in the proclamation of a state of siege is a thing fully recognised by the constitution, and (strange though the fact may appear) the authority of military courts during a state of siege is greater under the Republic than it was under the monarchy of Louis Philippe.<sup>1</sup>

Now, this kind of martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace, rebels may be lawfully killed just as enemies may be lawfully slaughtered in battle, or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a court-martial is illegal, and technically murder. Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence, than *Wolfe Tone's Case*.<sup>2</sup> In 1798, Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was

<sup>1</sup> See *Geoffroy's Case* (1832) 24 *Journal du Palais*, 1218, cited Forsyth, *op. cit.*, p. 483. Cf. for a statement of limits imposed by French law on action of military authorities during state of siege, Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 76, pp. 512, 513.

<sup>2</sup> (1798) 27 St. Tr. 614.

Part II. captured, and Wolfe Tone was brought to trial before a court-martial in Dublin. He was thereupon sentenced to be hanged. He held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place application was made to the Irish King's Bench for a writ of habeas corpus. The ground taken was that Wolfe Tone, not being a military person, was not subject to punishment by a court-martial, or, in effect, that the officers who tried him were attempting illegally to enforce martial law. The Court of King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the court was made up of judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of the law can be found than the protection of Wolfe Tone by the Irish Bench.



## CHAPTER IX

### THE ARMY<sup>1</sup>

THE British army may for the purposes of this treatise be treated as consisting of the Standing Army or, in technical language, the Regular Forces<sup>2</sup> and of the Territorial Army,<sup>3</sup> which, like the Militia,<sup>4</sup> is a

Chapter  
IX.

The Army.

<sup>1</sup> See *Manual of Military Law* (7th ed., 1929), especially ch. i, ii and ix; and Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 387-396. As to Standing Army, Bill of Rights, 1689; Army Discipline and Regulation Act, 1879; Army Act, 1881, with the amendments made by the Army (Annual) Act, which since 1917 applies also to the Royal Air Force, and is entitled the Army and Air Force (Annual) Act; Reserve Forces Act, 1937.

<sup>2</sup> "The expressions 'regular forces' and 'His Majesty's regular forces' mean officers and soldiers who by their commission, terms of enlistment, or otherwise, are liable to render continuously for a term military service to His Majesty in any part of the world, including, subject to the modifications in this Act mentioned, the Royal Marines and His Majesty's Indian forces and the Royal Malta Artillery, and subject to this qualification, that when the reserve forces are subject to military law such forces become during the period of their being so subject part of the regular forces" (Army Act, 1881, s. 190 (8)).

<sup>3</sup> See Territorial and Reserve Forces Act, 1907, and Territorial Army and Militia Act, 1921.

<sup>4</sup> The Militia.—The Territorial and Reserve Forces Act, 1907, did not repeal the various Militia Acts. Until these Acts were repealed the statutory power of raising the Militia, either regular or local, and of forming thereof regiments and corps continued to exist. The Militia as long as it existed was in theory a local force levied by conscription, but the power of raising it by ballot had been suspended for a considerable time, and the Militia was in fact recruited by voluntary enlistment. Embodiment converted the Militia into a regular army,

Part II. territorial army for the defence of the United Kingdom.

Each of these forces has been rendered subordinate to the law of the land. My object is not to give even an outline of the enactments affecting the army, but simply to explain the legal principles on which this supremacy of the law throughout the army has been secured.

It will be convenient in considering this matter to reverse the order pursued in the common text-books; these contain a great deal about the militia, the territorial force of its day, and comparatively little about the regular forces, or what we now call the "army." The reason of this is that historically the militia is an older institution than the permanent army, and the existence of a standing army is historically, and according to constitutional theories, an anomaly. Hence the standing army has often been treated by writers of authority as a sort of exceptional or subordinate topic, a kind of excrescence, so to speak, on the national and constitutional force known as the militia.<sup>1</sup> As a matter of fact, of course, the standing

but an army which could not be called upon to serve abroad. But the Militia was not raised after the reorganisation of the Forces consequent upon the passing of the Territorial and Reserve Forces Act, 1907. By the Act of 1921 the title of the Special Reserve, raised under the Act of 1907, was altered to Militia. This force had no historical connection with the Militia referred to in these notes.

The position of the Militia was affected by the Territorial and Reserve Forces Act, 1907, in two ways:—

(1) All the units of the general (or regular) Militia were either transferred to the Army Reserve or disbanded.

(2) The personnel of the regular Militia ceased to exist as such.

<sup>1</sup> In the seventeenth century Parliament apparently meant to rely for the defence of England upon this national army raised from the counties and placed under the guidance of country gentlemen. See Militia Act, 1662.

army is now the real national force, and the territorial force is a body of secondary importance.

Chapter  
IX.

*As to the Standing Army.*—A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary government; and in truth the existence of permanent paid forces has often in most countries and at times in England—notably under the Commonwealth—been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free government.<sup>1</sup> The belief, indeed, of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen, therefore, at the end of the seventeenth and the beginning of the eighteenth centuries, found themselves placed in this dilemma. With a standing army the country could not, they feared, escape from despotism; without a standing army the country could not, they were sure, avert invasion; the maintenance of national liberty appeared

Standing  
Army.  
Its exist-  
ence recon-  
ciled with  
Parlia-  
mentary  
govern-  
ment by  
annual  
Mutiny  
Acts.

<sup>1</sup> Macaulay, *History of England*, vol. iii (1858), pp. 42-47.

"Throughout the period [of the Civil War and the Interregnum] the military authorities maintained with great strictness their exclusive jurisdiction over offences committed both by officers and soldiers. More than once conflicts took place between the civil magistrates and the commanders of the army over this question."—Firth, *Cromwell's Army* (1902), p. 310. The author gives several examples (pp. 310-312) of the assertion or attempted assertion of the authority of the civil power, even during a period of military predominance.

Part II. to involve the sacrifice of national independence. Yet English statesmanship found almost by accident a practical escape from this theoretical dilemma, and the Mutiny Act, though an enactment passed in a hurry to meet an immediate peril, contains the solution of an apparently insolvable problem.

In this instance, as in others, of success achieved by what is called the practical good sense, the political instinct, or the statesmanlike tact of Englishmen, we ought to be on our guard against two errors.

We ought not, on the one hand, to fancy that English statesmen acted with some profound sagacity or foresight peculiar to themselves, and not to be found among the politicians of other countries. Still less ought we, on the other, to imagine that luck or chance helps Englishmen out of difficulties with which the inhabitants of other countries cannot cope. Political common sense, or political instinct, means little more than habitual training in the conduct of affairs; this practical acquaintance with public business was enjoyed by educated Englishmen a century or two earlier than by educated Frenchmen or Germans; hence the early prevalence in England of sounder principles of government than have till recently prevailed in other lands. The statesmen of the Revolution succeeded in dealing with difficult problems, not because they struck out new and brilliant ideas, or because of luck, but because the notions of law and government which had grown up in England were in many points sound, and because the statesmen of 1689 applied to the difficulties of their time the notions which were habitual to the more thoughtful

Englishmen of the day. The position of the army, in fact, was determined by an adherence on the part of the authors of the first Mutiny Act to the fundamental principle of English law, that a soldier may, like a clergyman, incur special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship.

The object and principles of the first Mutiny Act of 1689 are exactly the same as the object and principles of the Army Act,<sup>1</sup> under which the English army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or, to use a more accurate expression, with the supremacy of the law of the land.

The preamble to the first Mutiny Act has reappeared with slight alterations in every subsequent Mutiny Act, and recites that "Whereas no man may  
"be forejudged of life or limb, or subjected to any  
"kind of punishment by martial law, or in any other  
"manner than by the judgment of his peers, and  
"according to the known and established laws of  
"this realm; yet, nevertheless, it" [is] "requisite for  
"retaining such forces as are, or shall be, raised  
"during this exigence of affairs, in their duty an  
"exact discipline be observed; and that soldiers who  
"shall mutiny or stir up sedition, or shall desert  
"their majesties' service, be brought to a more ex-  
"emplary and speedy punishment than the usual

<sup>1</sup> Applied to the Air Force with certain amendments since 1917; Air Force (Constitution) Act, 1917, s. 12.



Part II. "forms of law will allow."<sup>1</sup>

This recital states the precise difficulty which perplexed the statesmen of 1689. Now let us observe the way in which it has been met.

A soldier, whether an officer or a private, in a standing army, or (to use the wider expression of modern Acts) "a person subject to military law,"<sup>2</sup> stands in a two-fold relation: the one is his relation towards his fellow-citizens outside the army; the other is his relation towards the members of the army, and especially towards his military superiors; any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier. His position in each respect is under English law governed by definite principles.

Soldier's  
position as  
citizen.

*A soldier's position as a citizen.* — The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to

<sup>1</sup> See Clode, *Military Forces of the Crown* (1869), vol. i, p. 499; cf. Army (Annual) Act, 1884. The variations in the modern Acts, though slight, are instructive.

<sup>2</sup> Part v of the Army Act, 1881, points out who under English law are "persons subject to military law," that is to say, who are liable to be tried and punished by court-martial for military, and in some circumstances for civil, offences under the provisions of the Act.

For our present purpose such persons (speaking broadly at any rate) appear to come within three descriptions:—first, persons belonging to the regular army and air forces (see Army Act, 1881, ss. 175 (1), 190 (8); Air Force (Constitution) Act, 1917, s. 12); secondly, persons belonging to the territorial army and air forces, in certain circumstances, viz. when they are being trained, when acting with any regular forces, when embodied, and when called out for actual military service for purposes of defence (Army Act, ss. 176, 190 (6) (a)); thirdly, persons not belonging to the regular forces or to the auxiliary forces who are either employed by, or followers of, the two forces on active service beyond the seas (*ibid.*, s. 176 (9), 10)). The regular forces include the Royal Marines when on shore and the reserve forces when called out. See Army Act, ss. 175, 176; cf. *Marks v. Frogley* [1898] 1 Q.B. 888.

all the duties and liabilities of an ordinary citizen. "Nothing in this Act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law."<sup>1</sup> These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

The results of this principle are traceable throughout the Mutiny Acts.

A soldier is subject to the same criminal liability as a civilian.<sup>2</sup> He may when in the British dominions be put on trial before any competent "civil" (*i.e.* non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal.<sup>3</sup> Thus, if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft.

A soldier cannot escape from civil liabilities, as, for example, responsibility for debts; the only exemption which he can claim is that he cannot be taken out of the service of the Crown by order of any court of law or be compelled to appear in person before such

<sup>1</sup> See Clode, *op. cit.*, vol. i, p. 500.

<sup>2</sup> Cf. Army Act, 1881, ss. 41, 144, 162.

<sup>3</sup> Cf. Jurisdiction in Homicides Act, 1862, and Clode, *op. cit.*, vol. i, pp. 206, 207.

Part II. court on a civil claim against him which does not exceed £30.<sup>1</sup>

No one who has entered into the spirit of continental legislation can believe that (say in France or Prussia) the rights of a private individual would thus have been allowed to override the claims of the public service.

In all conflicts of jurisdiction between a military and a civil court the authority of the civil court prevails. Thus, if a soldier is acquitted or convicted of an offence by a competent civil court, he cannot be tried for the same offence by a court-martial;<sup>2</sup> but an acquittal or conviction by a court-martial, say for manslaughter or robbery, is no plea to an indictment for the same offence at the Assizes.<sup>3</sup>

Order of  
superiors  
no defence  
to charge  
of crime.

When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence.<sup>4</sup>

<sup>1</sup> See Army Act, 1881, s. 144; cf. Clode, *op. cit.*, vol. i, pp. 207, 208, and *Thurston v. Mills* (1812) 16 East 254.

<sup>2</sup> Army Act, s. 162 (6).

<sup>3</sup> *Ibid.* Contrast the position of the army in relation to the law of the land in France. The fundamental principle of French law is, as it apparently always has been, that every kind of crime or offence committed by a soldier or person subject to military law must be tried by a military tribunal. See *Code de Justice Militaire*, arts. 55, 56, 76, 77, and Le Faure, *Les Lois militaires de la France* (1876), pp. 167, 173.

<sup>4</sup> Stephen, *History of the Criminal Law* (1883), vol. i, pp. 204-206; cf. Clode, *op. cit.*, vol. ii, pp. 125-155. The position of a soldier is curiously illustrated by the following case. X was a sentinel on board a ship in the Royal Navy when she was paying off. "The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship; and he then fired at a man who was in the boat, and killed him. The jury found that the sentinel fired under the mistaken impression that it was his duty. On a case reserved, the judges were unanimous that the killing was nevertheless murder;

This is a matter which requires explanation.

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. His situation and the line of his duty may be seen by considering how soldiers ought to act in the following cases.

During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound from a legal, as well as from a military, point of view to obey the command of their officer. It is a lawful

but were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified."—Russell, *Crime* (9th ed., 1936), vol. i, p. 510, citing *The King v. Thomas* (1816) MS., Bayley, J. The date of the decision is worth noticing; no one can suppose that the judges of 1816 were disposed to underrate the rights of the Crown and its servants. The judgment of the court rests upon and illustrates the incontrovertible principle of the common law that the fact of a person being a soldier and of his acting strictly under orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian, but compare *Keighley v. Bell* (1866) 4 F. & F. 763, at p. 790, cited in *The Queen v. Smith* (1900) 17 Cape S.C. Reports 561; K. & L. 348. In the opinion of Willes, J., obedience to an order of a superior officer which is not necessarily or manifestly illegal may be a good defence to a criminal charge against a person subject to military law.

Part II. order, and the men who carry it out are performing their duty both as soldiers and as citizens.

An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder, and liable to be hanged for it when convicted in due course of law. In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

An officer orders his men to fire on a crowd who he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be used. The order, therefore, to fire is not in itself a lawful order, that is, the colonel, or other officer, who gives it is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided; the following answer, given by Mr. Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide :—

“ I do not think, however, that the question how  
“ far superior orders would justify soldiers or sailors  
“ in making an attack upon civilians has ever been  
“ brought before the courts of law in such a manner



“ as to be fully considered and determined. Probably  
“ upon such an argument it would be found that the  
“ order of a military superior would justify his in-  
“ feriors in executing any orders for giving which they  
“ might fairly suppose their superior officer to have  
“ good reasons. Soldiers might reasonably think  
“ that their officer had good grounds for ordering  
“ them to fire into a disorderly crowd which to them  
“ might not appear to be at that moment engaged in  
“ acts of dangerous violence, but soldiers could hardly  
“ suppose that their officer could have any good  
“ grounds for ordering them to fire a volley down a  
“ crowded street when no disturbance of any kind  
“ was either in progress or apprehended. The doc-  
“ trine that a soldier is bound under all circumstances  
“ whatever to obey his superior officer would be fatal  
“ to military discipline itself, for it would justify the  
“ private in shooting the colonel by the orders of the  
“ captain, or in deserting to the enemy on the field of  
“ battle on the order of his immediate superior. I  
“ think it is not less monstrous to suppose that  
“ superior orders would justify a soldier in the  
“ massacre of unoffending civilians in time of peace,  
“ or in the exercise of inhuman cruelties, such as the  
“ slaughter of women and children, during a rebellion.  
“ The only line that presents itself to my mind is  
“ that a soldier should be protected by orders for  
“ which he might reasonably believe his officer to  
“ have good grounds. The inconvenience of being  
“ subject to two jurisdictions, the sympathies of which  
“ are not unlikely to be opposed to each other, is an  
“ inevitable consequence of the double necessity of  
“ preserving on the one hand the supremacy of the

Part II. "law, and on the other the discipline of the  
"army."<sup>1</sup>

The hardship of a soldier's position resulting from this inconvenience is much diminished by the power of the Crown to nullify the effect of an unjust conviction by means of a pardon.<sup>2</sup> While, however, a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law, he can under no circumstances escape the chance of his military conduct becoming the subject of inquiry before a civil tribunal, and cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime.<sup>3</sup>

Soldier's  
position as  
member of  
army.

*A soldier's position as a member of the army.*—  
A citizen on entering the army becomes liable to special duties as being "a person subject to military law." Hence acts which if done by a civilian would be either no offence at all or only slight misdemeanours.

<sup>1</sup> Stephen, *op. cit.*, vol. i, pp. 205, 206; cf. Willes, J., in *Keighley v. Bell* (1866) 4 F. & F. 763. See also opinion of Lord Bowen, cited in *App. sec. v, post.*

<sup>2</sup> As also by the right of the Attorney-General as representing the Crown to enter a *nolle prosequi*. See Stephen, *op. cit.*, vol. i, p. 496, and Archbold, *Pleading, Evidence and Practice in Criminal Cases* (30th ed., 1938), p. 110.

<sup>3</sup> *Buron v. Denman* (1848) 2 Ex. 167, is sometimes cited as showing that obedience to the orders of the Crown is a legal justification to an officer for committing a breach of law, but the decision in that case does not, in any way, support the doctrine erroneously grounded upon it. What the judgment in *Buron v. Denman* shows is that an act done by an English military or naval officer in a foreign country to a foreigner, previously authorised or subsequently ratified by the Crown, is an act of state, but does not constitute any breach of law for which an action can be brought against the officer in an English court; cf. *Feather v. The Queen* (1865) 6 B. & S. 257, at p. 295.

e.g. an insult or a blow offered to an officer, may when done by a soldier become serious crimes and expose the person guilty of them to grave punishment. A soldier's offences, moreover, can be tried and punished by a court-martial. He therefore in his military character of a soldier occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen is subject to all the liabilities imposed by military law; but though this is so, it is not to be supposed that, even as regards a soldier's own position as a military man, the rule of the ordinary law is, at any rate in time of peace, excluded from the army.

The general principle on this subject is that the courts of law have jurisdiction to determine who are the persons subject to military law, and whether a given proceeding, alleged to depend upon military law, is really justified by the rules of law which govern the army.

Hence flow the following (among other) consequences.

The civil courts determine<sup>1</sup> whether a given person is or is not "a person subject to military law."<sup>2</sup>

Enlistment, which constitutes the contract<sup>3</sup> by

<sup>1</sup> See *Wolfe Tone's Case* (1798) 27 St. Tr. 614; *Frye v. Ogle* (1743), cited *Manual of Military Law* (7th ed., 1929), ch. viii, sec. 35.

<sup>2</sup> See *Army Act, 1881*, ss. 175-184.

<sup>3</sup> The enlistment of the soldier is a species of contract between the Sovereign and the soldier, and under the ordinary law cannot be altered without the consent of both parties. The result is that the conditions laid down in the Act under which a man is enlisted cannot be varied without his consent; but his service is liable to be determined at the pleasure of the Crown and there is no remedy for dismissal or recovery of pay; see App. sec. i, (6) (B), p. 530.—*Manual of Military Law* (7th ed., 1929), ch. x, sec. 21.

Part II. which a person becomes subject to military law, is a civil proceeding, and a civil court may sometimes have to inquire whether a man has been duly enlisted, or whether he is or is not entitled to his discharge.<sup>1</sup>

If a court-martial exceeds its jurisdiction, or an officer, whether acting as a member of a court-martial or not, does any act not authorised by law, the action of the court, or of the officer, is subject to the supervision of the courts. "The proceedings by which  
"the courts of law supervise the acts of courts-  
"martial and of officers may be criminal or civil.  
"Criminal proceedings take the form of an indictment for assault, false imprisonment, manslaughter,  
"or even murder. Civil proceedings may either  
"be preventive, *i.e.* to restrain the commission  
"or continuance of an injury; or remedial, *i.e.* to  
"afford a remedy for injury actually suffered. Broadly  
"speaking, the civil jurisdiction of the courts of law  
"is exercised as against the tribunal of a court-  
"martial by writs of prohibition or certiorari; and as  
"against individual officers by actions for damages.  
"A writ of habeas corpus also may be directed to  
"any officer, governor of a prison, or other, who has

<sup>1</sup> See Army Act, 1881, s. 96, for special provisions as to the delivering to a master of an apprentice who, being under twenty-one, has enlisted as a soldier. Under the present law, at any rate, it can very rarely happen that a court should be called upon to consider whether a person is improperly detained in military custody as a soldier. See Army Act, s. 100, sub-ss. 2, 3. The courts used to interfere, when soldiers were impressed, in cases of improper impressment. See Clode, *Military Forces of the Crown* (1869), vol. ii, pp. 8, 587.

A civil court may also be called upon to determine whether a person subject to military law has, or has not, a right to resign his commission; *Hearson v. Churchill* [1892] 2 Q.B. 144.

"in his custody any person alleged to be improperly  
"detained under colour of military law."<sup>1</sup>

Lastly, the whole existence and discipline of the standing army, at any rate in time of peace, depends upon the passing of what is known as an annual Mutiny Act,<sup>2</sup> or in strict correctness of the Army (Annual) Act. If this Act were not in force a soldier would not be bound by military law. Desertion would be at most only a breach of contract, and striking an officer would be no more than an assault.

*As to the Territorial Army.*—This force in many respects represents the militia and the volunteers. It is, as was in fact the militia in later times, raised by voluntary enlistment. All members of the Territorial Army are required, not by military law, but by the actual terms of their engagement, to accept liability to serve overseas, provided that an Act of Parliament has been passed authorising the dispatch overseas of the Territorial Army. It is from its nature, in this too like the militia, a body hardly capable of being used for the overthrow of Parliamentary government. But even with regard to this territorial force, care has been taken to ensure that it shall be subject to the rule of law. The members of this local army are (speaking in general terms)

<sup>1</sup> *Manual of Military Law* (6th ed., 1914), ch. viii, sec. 8, substantially reproduced in the 7th ed. (1929), ch. viii, sec. 2. It should, however, be noted that the courts of law will not, in general at any rate, deal with rights dependent on military status and military regulations.

<sup>2</sup> The case stands thus: The discipline of the standing army depends on the Army Act, 1881, which by s. 2 continues in force only for such time as may be specified in an annual Act, which is passed yearly, and called the Army (Annual) Act. This Act keeps in existence the standing army and continues the Army Act in force. It is, therefore, in strictness upon the passing of the Army (Annual) Act that depends the existence and the discipline of the standing army.



Part II. subject to military law only when in training or when the force is embodied.<sup>1</sup> Embodiment indeed converts the territorial force into a territorial army, an army which previously could not be required to serve abroad.

But the embodiment can lawfully take place only in case of imminent national danger or great emergency, or unless the emergency requires it, until Parliament has had an opportunity of presenting an address against the embodiment of the Territorial Army. The general effect of the enactments on the subject is that, at any rate when there is a Parliament in existence, the embodiment of this territorial force cannot, except under the pressure of urgent necessity, be carried out without the sanction of Parliament.<sup>2</sup> Add to this, that the maintenance of discipline among the members of the Territorial Army when it is embodied depends on the continuance in force of the Army Act and of the Army (Annual) Act.<sup>3</sup>

<sup>1</sup> But in one case at least, i.e. failure to attend on embodiment, a man of the Territorial Army may be liable to be tried by court-martial, though not otherwise subject to military law. (Territorial and Reserve Forces Act, 1907, s. 20; see also as to cases of concurrent jurisdiction of a court-martial and a court of summary jurisdiction, *ibid.*, ss. 24, 25.)

<sup>2</sup> Cf. Territorial and Reserve Forces Act, 1907, s. 17; Reserve Forces Act, 1882, ss. 12, 13; Militia Act, 1882, s. 18, and see note 4, p. 295, *ante*.

<sup>3</sup> There exists an instructive analogy between the position of persons subject to military law, and the position of the clergy of the Established Church.

A clergyman of the National Church, like a soldier of the National Army, is subject to duties and to courts to which other Englishmen are not subject. He is bound by restrictions, as he enjoys privileges peculiar to his class, but the clergy are no more than soldiers exempt from the law of the land. Any deed which would be a crime when done by a layman, is a crime when done by a clergyman, and is in either case dealt with by the ordinary tribunals.

Moreover, as the common law courts determine the legal limits to the jurisdiction of courts-martial, so the same courts in reality determine (subject, of course, to Acts of Parliament) what are the limits to the jurisdiction of ecclesiastical courts.

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The original difficulty, again, of putting the clergy on the same footing as laymen, was at least as great as that of establishing the supremacy of the civil power in all matters regarding the army. Each of these difficulties was met at an earlier date and has been overcome with more completeness in England than in some other countries. We may plausibly conjecture that this triumph of law was due to the acknowledged supremacy of the King in Parliament, which itself was due to the mode in which the King, acting together with the two Houses, manifestly represented the nation, and therefore was able to wield the whole moral authority of the state.

## CHAPTER X

### THE REVENUE<sup>1</sup>

**Part II.** As in treating of the army my aim was simply to  
**Revenue.** point out what were the principles determining the relation of the armed forces of the country to the law of the land, so in treating of the revenue my aim is not to give even a sketch of the matters connected with the raising, the collection, and the expenditure of the national income, but simply to show that the collection and expenditure of the revenue, and all things appertaining thereto, are governed by strict rules of law. Attention should be fixed upon three points,—the *source* of the public revenue—the *authority* for expending the public revenue—and the *securities* provided by law for the due appropriation of the public revenue, that is, for its being expended in the exact manner which the law directs.

**Source.** *Source of public revenue.*—It is laid down by Blackstone and other authorities that the revenue consists of the hereditary or “ordinary” revenue of the Crown and of the “extraordinary” revenue depending upon taxes imposed by Parliament.

<sup>1</sup> See Hills and Fellowes, *Finance of Government* (2nd ed., 1932), and May, *Parliamentary Practice* (13th ed., 1924), ch. xxi.

Historically this distinction is of interest. But for our purpose we need hardly trouble ourselves at all with the hereditary revenue of the Crown, arising from Crown lands, droits of admiralty, and the like. It forms an insignificant portion of the national resources, amounting to not much more than £500,000 a year. It does not, moreover, at the present moment belong specially to the Crown, for it was commuted at the beginning of the reign of King Edward VII.,<sup>1</sup> as it was at the beginning of the reign of William IV. and of the reign of Queen Victoria, for a fixed "civil list,"<sup>2</sup> or sum payable yearly for the support of the dignity of the Crown. The whole then of the hereditary revenue is now paid into the national exchequer and forms part of the income of the nation. We may, therefore, putting the hereditary revenue out of our minds, direct our whole attention to what is oddly enough called the "extraordinary," but is in reality the ordinary, or Parliamentary, revenue of the nation.

The whole of the national revenue had come to amount in a normal year to somewhere about £144,000,000.<sup>3</sup> It is (if we put out of sight the small hereditary revenue of the Crown) raised wholly by taxes imposed by law. The national revenue, therefore, depends wholly upon law and upon statute law; it is the creation of Acts of Parliament.

While no one can nowadays fancy that taxes

<sup>1</sup> Civil List Acts, 1910, 1936, 1937.

<sup>2</sup> See as to Civil List, May, *Constitutional History* (1912 ed.), vol. i, ch. iv.

<sup>3</sup> In 1907 the total revenue for the year (Exchequer receipts) 1906-7 was £144,814,000. The figure, which excludes borrowings on long and short term loans, had risen by 1938 to nearly £1,000,000,000.

## Part II.

can be raised otherwise than in virtue of an Act of Parliament, there prevails, it may be suspected, with many of us a good deal of confusion of mind as to the exact relation between the raising of the revenue and the sitting of Parliament. People often talk as though, if Parliament did not meet, no taxes would be legally payable, and the assembling of Parliament were therefore secured by the necessity of filling the national exchequer. This idea is encouraged by the study of periods, such as the reign of Charles I., during which the Crown could not legally obtain necessary supplies without the constant intervention of Parliament. But the notion that at the present day no money could legally be levied if Parliament ceased to meet is unfounded. Millions of money would come into the Exchequer even though Parliament did not sit at all. For though all taxation depends upon Act of Parliament, it is far from being the case that all taxation now depends upon annual or temporary Acts.

Taxes are made payable in two different ways, *i.e.* either by annual enactment in the Finance Act or by Acts which impose the tax until repeal or amendment or for a fixed period exceeding one year.<sup>1</sup>

Taxes, the proceeds of which amounted in the year 1906-7 to at least three-fourths of the whole yearly revenue, are imposed by permanent Acts; such taxes are the land tax, the excise, the stamp duties, and by far the greater number of existing taxes. These taxes would continue to be payable even though Parliament should not be convened

<sup>1</sup> And also since 1932 by statutory orders under the Import Duties Act, 1932, in the case of customs duties.—Ed.



for years. We should all, to take an example which comes home to every one, be legally compellable to buy the stamps for our letters even though Parliament did not meet again for several years.

Other taxes—and notably the income tax—the proceeds of which make up the remainder of the national income, are imposed by yearly Acts.<sup>1</sup> If by any chance Parliament should not be convened for a year, no one would be under any legal obligation to pay income tax.

This distinction between revenue depending upon permanent Acts and revenue depending upon temporary Acts is worth attention, but the main point, of course, to be borne in mind is that all taxes are imposed by statute, and that no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the judges to be due from him under Act of Parliament.

*Authority for expending revenue.*—At one time revenue once raised by taxation was in truth and in reality a grant or gift by the Houses of Parliament to the Crown. Such grants as were made to Charles the First or James the First were moneys truly given to the King. He was, as a matter of moral duty, bound, out of the grants made to him, as out of the hereditary revenue, to defray the expenses of government; and the gifts made to the King by Parliament were never intended to be “money to put into his own pocket,” as the expression goes. Still it was in truth money of which the King or his Ministers could and did regulate the distribution. One of the

Authority  
for ex-  
penditure.

<sup>1</sup> The only taxes imposed annually are the customs duty on tea, the income tax and surtax.

## Part II.

singularities which mark the English constitution is the survival of mediæval notions, which more or less identified the King's property with the national revenue, after the passing away of the state of society to which such ideas naturally belonged; in the time of George the Third many public expenses, as, for example, the salaries of the judges, were charged upon the civil list, and thus were mixed up with the King's private expenditure. At the present day, however, the whole public revenue is treated, not as the King's property, but as public income; and as to this two matters deserve special observation.

*First*, The whole revenue of the nation is paid into the Bank of England<sup>1</sup> to the "account of his Majesty's Exchequer,"<sup>2</sup> mainly through the Inland Revenue, the Customs and Excise and the Post Office. That office is a mere place for the receipt of taxes; it is a huge money-box into which day by day moneys paid as taxes are dropped, and whence such moneys are taken daily to the Bank. What, I am told, takes place is this. Each day large amounts are received at the Inland Revenue Office; two gentlemen come there each afternoon in a cab from the Bank; they go through the accounts for the day with the proper officials; they do not leave

<sup>1</sup> See Exchequer and Audit Departments Act, 1866, s. 10.

<sup>2</sup> *Ibid.* and *Control and Audit of Public Receipts and Expenditure*, pp. 7, 8. By a system of appropriations in aid moneys which formerly were treated as extra receipts, and paid into the Exchequer, are now shown in the Estimates separately from the money which Parliament is asked to vote and are applied by the Departments to reduce the total of the Supply Vote. Appropriations in aid must receive parliamentary sanction in the annual Appropriation Act and surplus receipts under this head are surrendered to the Exchequer.

till every item is made perfectly clear ; they then take all the money received, and drive off with it and pay it into the Bank of England.

*Secondly*, Not a penny of revenue can be legally expended except under the authority of some Act of Parliament.

This authority may be given by a permanent Act, as, for example, by the Civil List Act, 1837, or by the National Debt and Local Loans Act, 1887 ; or it may be given by the Appropriation Act, that is, the annual Act by which Parliament "appropriates" or fixes the sums payable to objects (the chief of which is the support of the army and navy) which are not provided for, as is the payment of the National Debt, by permanent Acts of Parliament.

The whole thing, to express it in general terms, stands thus.

There is paid into the Bank of England in a normal year a national income raised by different taxes amounting to nearly £144,000,000 per annum, This £144,000,000 constitutes the revenue or "consolidated fund."

Every penny of it is, unless the law is broken, paid away in accordance with Act of Parliament. The authority to make payments from it is given in many cases by permanent Acts ; thus the whole of the interest on the National Debt is payable out of the Consolidated Fund under the National Debt and Local Loans Act, 1887. The order or authority to make payments out of it is in other cases given by a yearly Act, namely, the Appropriation Act, which determines the mode in which the supplies granted by Parliament

Part II.

(and not otherwise appropriated by permanent Acts) are to be spent. In either case, and this is the point to bear in mind, payments made out of the national revenue are made by and under the authority of the law, namely, under the directions of some special Act of Parliament.

The details of the method according to which supplies are annually voted and appropriated by Parliament are amply treated of in works which deal with Parliamentary practice.<sup>1</sup> The matter which requires our attention is the fact that each item of expenditure (such, for example, as the total sum of wages paid to the army and navy) which is not directed and authorised by some permanent Act is ultimately authorised by the Appropriation Act for the year, or by special Acts which for convenience are passed prior to the Appropriation Act and are enumerated therein. The expenditure, therefore, no less than the raising of taxation, depends wholly and solely upon Parliamentary enactment.

Security  
for proper  
expendi-  
ture.

*Security for the proper appropriation of the revenue.*—What, it may be asked, is the real security that moneys paid by the taxpayers are expended by the government in accordance with the intention of Parliament?

The answer is that this security is provided by an elaborate scheme of control and audit. Under this system not a penny of public money can be obtained by the government without the authority or sanction of persons (quite independent, be it remarked, of the Cabinet) whose duty it is to see that no money is paid out of the Exchequer except

<sup>1</sup> See especially May, *Parliamentary Practice* (13th ed., 1924), ch. xxi.

under legal authority. To the same officials ultimately comes the knowledge of the way in which money thus paid out is actually expended, and they are bound to report to Parliament upon any expenditure which is or may appear to be not authorised by law.

The centre of this system of Parliamentary control is the Comptroller and Auditor General.<sup>1</sup>

He is a high official, absolutely independent of the Cabinet; he can take no part in politics, for he cannot be either a member of the House of Commons, or a peer of Parliament. He in common with his subordinate—the Assistant Comptroller and Auditor General—is appointed by a patent under the Great Seal, holds his office during good behaviour, and can be removed only on an address from both Houses of Parliament.<sup>2</sup> He is head of the Exchequer and Audit Department. He thus combines in his own person two characters which formerly belonged to different officials. He is controller of the issue of public money; he is auditor of public accounts. He is called upon, therefore, to perform two different functions, which the reader ought, in his own mind, to keep carefully distinct from each other.

In exercise of his duty of control the Comptroller General is bound, with the aid of the officials under him, to see that the whole of the national revenue, which, it will be remembered, is lodged in the Bank of England to the account of the Exchequer, is paid out under legal authority, that is, under the provisions of some Act of Parliament.

<sup>1</sup> See Hills and Fellowes, *op. cit.*, pp. 79-85, 107-113.

<sup>2</sup> Exchequer and Audit Departments Act, 1886, s. 3.



**Part II.**

The Comptroller General is enabled to do this because, whenever the Treasury (through which office alone the public moneys are drawn out from the Bank) needs to draw out money for the public service, the Treasury must make a requisition to the Comptroller General authorising the payment from the public moneys at the Bank of the definite sum required.

The payments made by the Treasury are, as already pointed out, made either under some permanent Act, for what are technically called "Consolidated Fund services," as, for example, to meet the interest on the National Debt, or under the yearly Appropriation Act, for what are technically called "supply services," as, for example, to meet the expenses of the army or the navy.

In either case the Comptroller General must, before granting the necessary credit, satisfy himself that he is authorised in doing so by the terms of the Act under which it is demanded. He must also satisfy himself that every legal formality, necessary for obtaining public money from the Bank, has been duly complied with. Unless, and until, he is satisfied he ought not to grant, and will not grant, a credit for the amount required; and until this credit is obtained, the money required cannot be drawn out of the Bank.

The obtaining from the Comptroller General of a grant of credit may appear to many readers a mere formality, and we may suppose that it is in most cases given as a matter of course. It is, however, a formality which gives an opportunity to an official, who has no interest in deviating from the law,

for preventing the least irregularity on the part of the government in the drawing out of public money. Chapter  
X.

The Comptroller's power of putting a check on government expenditure has, oddly enough, been pushed to its extreme length in comparatively modern times. In 1811 England was in the midst of the great war with France; the King was a lunatic, a Regency Bill was not yet passed, and a million pounds were required for the payment of the navy. Lord Grenville, the then Auditor of the Exchequer, whose office corresponded to a certain extent with that of the present Comptroller and Auditor General, refused to draw the necessary order on the Bank, and thus prevented the million, though granted by Parliament, from being drawn out. The ground of his lordship's refusal was that he had received no authority under the Great Seal or the Privy Seal, and the reason why there was no authority under the Privy Seal was that the King was incapable of affixing the Sign Manual, and that the Sign Manual not being affixed, the clerks of the Privy Seal felt, or said they felt, that they could not consistently with their oaths allow the issue of letters of Privy Seal upon which the warrant under the Privy Seal was then prepared. All the world knew the true state of the case. The money was granted by Parliament, and the irregularity in the issue of the warrants was purely technical, yet the law officers—members themselves of the Ministry—advised that Lord Grenville and the clerks of the Privy Seal were in the right. This inconvenient and, as it seems to modern readers,

Part II. unreasonable display of legal scrupulosity masked, it may be suspected, a good deal of political by-play. If Lord Grenville and his friends had not been anxious that the Ministry should press on the Regency Bill, the officials of the Exchequer would perhaps have seen their way through the technical difficulties which, as it was, appeared insurmountable, and it is impossible not to suspect that Lord Grenville acted rather as a party leader than as Auditor of the Exchequer. But be this as it may, the debates of 1811<sup>1</sup> prove to demonstration that a Comptroller General can, if he chooses, put an immediate check on any irregular dealings with public moneys.

In exercise of his duty as Auditor the Comptroller General audits all the public accounts;<sup>2</sup> he reports annually to Parliament upon the accounts of the past year. Accounts of the expenditure under the Appropriation Act are submitted by him at the beginning of every session to the Public Accounts Committee of the House of Commons—a Committee appointed for the examination of the accounts—showing the appropriation of the sums granted by Parliament to meet the public expenditure. This examination is no mere formal or perfunctory supervision; a glance at the reports of the Committee shows that the smallest expenses which bear the least appearance of irregularity, even if amounting only to a pound or two, are gone into and discussed

<sup>1</sup> Cobbett's *Parliamentary Debates*, vol. xviii (1812), columns 678, 734, 787.

<sup>2</sup> In auditing the accounts he directs attention to any excess of authorised expenditure as well as to irregular payments and extravagant items in the accounts of a Department, and in his report to Parliament calls attention to any expenditure of doubtful legality or extravagance.

by the Committee. The results of their discussions are published in reports submitted to Parliament.

The general result of this system of control and audit is, that in England we possess accounts of the national expenditure of an accuracy which cannot be rivalled by the public accounts of other countries, and that every penny of the national income is expended under the authority and in accordance with the provisions of some Act of Parliament.<sup>1</sup>

How, a foreign critic might ask, is the authority of the Comptroller General compatible with the orderly transaction of public business ; how, in short, does it happen that difficulties like those which arose in 1811 are not of constant recurrence ?

The general answer of course is, that high English officials, and especially officials removed from the

<sup>1</sup> The main features of the system for the control and audit of national expenditure have been authoritatively summarised as follows :—

“The gross revenue collected is paid into the Exchequer.

“Issues from the Exchequer can only be made to meet expenditure which has been sanctioned by Parliament, and to an amount not exceeding the sums authorised.

“The issues from the Exchequer and the audit of Accounts are under the control of the Comptroller and Auditor General, who is an independent officer responsible to the House of Commons, and who can only be removed by vote of both Houses of Parliament.

“Such payments only can be charged against the vote of a year as actually came in course of payment within the year.

“The correct appropriation of each item of Receipt and Expenditure is ensured.

“All unexpended balances of the grants of a year are surrendered to the Exchequer, as also are all extra Receipts and the amount of Appropriations-in-Aid received in excess of the sum estimated to be taken in aid of the vote.

“The accounts of each year are finally reviewed by the House of Commons, through the Committee of Public Accounts, and any excess of expenditure over the amount voted by Parliament for any service must receive legislative sanction.”—*Control and Audit of Public Receipts and Expenditure* (1885), pp. 24, 25.

## Part II.

sphere of politics, have no wish or temptation to hinder the progress of public business; the Auditor of the Exchequer was in 1811, be it noted, a peer and a statesman. The more technical reply is, that the law provides two means of overcoming the perversity or factiousness of any Comptroller who should without due reason refuse his sanction to the issue of public money. He can be removed from office on an address of the two Houses, and he probably might, it has been suggested, be coerced into the proper fulfilment of his duties by a *mandamus*<sup>1</sup> from the High Court of Justice. The worth of this suggestion, made by a competent lawyer, has never been, and probably never will be tested. But the possibility that the executive might have to seek the aid of the courts in order to get hold of moneys granted by Parliament, is itself a curious proof of the extent to which the expenditure of the revenue is governed by law, or, what is the same thing, may become dependent on the decision of the judges upon the meaning of an Act of Parliament.<sup>2</sup>

<sup>1</sup> Hearn, *Government of England* (2nd ed., 1887), p. 375.

<sup>2</sup> This chapter deals only with the Revenue from the point of view of the rules of law governing the collection and expenditure of money raised by taxation by the Central Government. The full account of Public Revenue would of course include loan expenditure and rates levied by, and other sources of income of, local authorities.

The rule which requires all proposals for expenditure to receive the recommendation of the Crown is one of the most fundamental rules of ministerial responsibility. But with this aspect of the subject the author was not concerned here.—ED.



## CHAPTER XI

### THE RESPONSIBILITY OF MINISTERS

MINISTERIAL responsibility means two utterly different things. Chapter  
XI.

It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons. Ministerial  
responsi-  
bility.

This is a matter depending on the conventions of the constitution with which law has no direct concern.

It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part.

This responsibility, which is a matter of law, rests on the following foundation. There is not to be found in the law of England, as there is found in most foreign constitutions, an explicit statement that the acts of the monarch must always be done through a Minister, and that all orders given by the Crown must, when expressed in writing, as they generally are, be countersigned by a Minister. Practically, however, the rule exists.<sup>1</sup>

In order that an act of the Crown may be recognised as an expression of the Royal will and have any legal effect whatever, it must in general be done with the assent of, or through some Minister or Ministers who will be held responsible for it. For the Royal will can, speaking generally, be expressed

<sup>1</sup> In the case of some of the independent statutory authorities, such as the Unemployment Assistance Board, the function of the body and of its officers and servants are by statute deemed to be exercised on behalf of the Crown. The functions are such that they could not be exercised by the Crown or the body without statutory authority.—ED.

Part II. only in one of three different ways, viz. (1) by order in Council ; (2) by order, commission, or warrant under the sign-manual; (3) by proclamations, writs, patents, letters, or other documents under the Great Seal.

An order in Council is made by the King "by and with the advice of his Privy Council"; and those persons who are present at the meeting of the Council at which the order was made, bear the responsibility for what was there done. The sign-manual warrant, or other document to which the sign-manual is affixed, bears in general the countersignature of one responsible Minister or of more than one; though it is not unfrequently authenticated by some one of the seals for the use of which a Secretary of State is responsible. The Great Seal is affixed to a document on the responsibility of the Chancellor, and there may be other persons also, who, as well as the Chancellor, are made responsible for its being affixed. The result is that at least one Minister and often more must take part in, and therefore be responsible for, any act of the Crown which has any legal effect, e.g. the making of a grant, the giving of an order, or the signing of a treaty.<sup>1</sup>

The Minister or servant of the Crown who thus takes part in giving expression to the Royal will is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by pleading that he acted in obedience to royal orders. Now supposing that the act done is illegal, the Minister

<sup>1</sup> On the whole of this subject the reader should consult Anson, *Law and Custom of the Constitution*, vol. ii (4th ed., 1935), part i, pp. 62-72, 170, 171. Anson gives a full account of the forms for the expression of the Royal pleasure and of the effect of these forms in enforcing the legal responsibility of Ministers. See also Clode, *Military Forces of the Crown* (1869), vol. ii, pp. 320, 321; *Buron v. Denman* (1848) 2 Ex. 167, at p. 189; Great Seal Act, 1884; Wade and Phillips, *Constitutional Law* (2nd ed., 1935), App. B.

concerned in it becomes at once liable to criminal or civil proceedings in a court of law. In some instances, it is true, the only legal mode in which his offence could be reached may be an impeachment. But an impeachment itself is a regular though unusual mode of legal procedure before a recognised tribunal, namely, the High Court of Parliament. Impeachments indeed may, though one took place as late as 1805, be thought now obsolete, but the cause why this mode of enforcing Ministerial responsibility is almost out of date is partly that Ministers are now rarely in a position where there is even a temptation to commit the sort of crimes for which impeachment is an appropriate remedy, and partly that the result aimed at by impeachment could now in many cases be better obtained by proceedings before an ordinary court. The point, however, which should never be forgotten is this: it is now well-established law that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land. Behind parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law.<sup>1</sup>

<sup>1</sup> See Intro. pp. cxxxvi *et seq.*, *ante*, for the sanctions which ensure obedience to the conventions relating to ministerial responsibility. See App. sec. i (6) (B), for the extent of the protection which the law still affords to the Crown and its Ministers from legal liability.—ED.

## CHAPTER XII<sup>1</sup>

### RULE OF LAW COMPARED WITH *DROIT ADMINISTRATIF*<sup>2</sup>

Part II.  
Introduction.

IN many continental countries, and notably in France, there exists a scheme of administrative law<sup>3</sup>—known

<sup>1</sup> No attempt has been made to deal with the contents of this chapter by revision of footnotes. Thus both the text and the notes (with unimportant exceptions) are the unaltered work of the author. See Intro. pp. lxvii-lxxxiii, *ante*, and App. sec. i, for a present view of the rule of law and accounts of English and French administrative law respectively.—ED.

<sup>2</sup> On *droit administratif* the author cited Aucoc, *Conférences sur l'Administration et sur le Droit administratif* (3rd ed., 1885); Berthélemy, *Traité Élémentaire de Droit administratif* (5th ed., 1908); Chardon, *L'Administration de la France; Les fonctionnaires* (1908), pp. 79-105; Duguit, *Traité de Droit constitutionnel* (1st ed., 1911); Duguit, *L'État, les gouvernants et les agents* (1903); Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907); Esmein, *Éléments de Droit constitutionnel français* (1st ed., 1896), Hauriou, *Précis de Droit administratif* (3rd ed., 1897); Jacquelin, *La Juridiction administrative* (1891); Jacquelin, *Les Principes Dominants du Contentieux Administratif* (1899); Jèze, *Les principes généraux du Droit administratif* (1st ed., 1904); Laferrrière, *Traité de la Juridiction administrative et des recours contentieux*, 2 vols. (2nd ed., 1896); Teissier, *La responsabilité de la puissance publique* (1906).

Dicey's note read as follows:—

"It is not my aim in this chapter to give a general account of *droit administratif*. My object is to treat of *droit administratif* in so far as its fundamental principles conflict with modern English ideas of the rule of law, and especially to show how it always has given, and still does give, special protection or privileges to the servants of the State. I cannot, however, avoid mentioning some other aspects of a noteworthy legal system or omit some notice of the mode in which the administrative law of France, based as it originally was on the prerogatives of the Crown under the *ancien régime*, has of recent years, by the genius of French legists, been more or less judicialised—if so I may render the French term *juridictionnaliser*—and incorporated with the law of the land."

<sup>3</sup> Known in different countries by different names, *e.g.* in Germany

to Frenchmen as *droit administratif*—which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law. This opposition is specially apparent in the protection given in foreign countries to servants of the State, or, as we say in England, of the Crown, who, whilst acting in pursuance of official orders, or in the *bona fide* attempt to discharge official duties, are guilty of acts which in themselves are wrongful or unlawful. The extent of this protection has in France—with which country we are for the most part concerned—varied from time to time. It was once all but complete; it is now far less extensive than it was thirty-six years ago.<sup>1</sup> It forms only one portion of the whole system of *droit administratif*,<sup>2</sup> but it is the part of French law to which in this chapter I wish to direct particularly the attention of students. I must, however, impress upon them that the whole body of *droit administratif* is well worth their study. It has been imitated in most of the countries of continental Europe. It

as *Verwaltungsrecht*. The administrative law of France comes nearer than does the *Verwaltungsrecht* of Germany (cf. Otto Mayer, *Le Droit administratif allemand* (1903-1906) (vol. i, 1903), para. 17, pp. 293-315, to the rule of law as understood by Englishmen. Here, as elsewhere, it is the similarity as much as the dissimilarity between France and England which prompts comparison. The historical glories of French arms conceal the important fact that among the great States of Europe, France and England have the most constantly attempted, though with unequal success, to maintain the supremacy of the civil power against any class which defies the legitimate sovereignty of the nation.

<sup>1</sup> Or than it was throughout the German Empire. See Duguit, *L'Etat, les gouvernants et les agents* (1903), ch. v, para. 10, note 1, p. 624.

<sup>2</sup> This recognition that *contentieux administratif* forms only a part of *droit administratif* was first made in the seventh edition (1908).—ED.



## Part II.

illustrates, by way of contrast, the full meaning of that absolute supremacy of the ordinary law of the land—a foreign critic might say of that intense legalism—which we have found to be a salient feature of English institutions. It also illustrates, by way of analogy rather than of contrast, some phases in the constitutional history of England. For *droit administratif* has, of recent years, been so developed as to meet the requirements of a modern and a democratic society, and thus throws light upon one stage at least in the growth of English constitutional law.<sup>1</sup>

Our subject falls under two main heads. The one head embraces the nature and the historical growth of *droit administratif*, and especially of that part thereof with which we are chiefly concerned. The other head covers a comparison between the English rule of law and the *droit administratif* of France.

(A: *Droit  
Adminis-  
tratif.*

For the term *droit administratif* English legal phraseology supplies no proper equivalent. The words “administrative law,” which are its most natural rendering, are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.<sup>2</sup>

This absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England, and in countries which, like the United States, derive their civilisation from English sources, the system of administrative law and the very principles on which it rests are in truth unknown.

<sup>1</sup> See pp. 375-383, *post*.

<sup>2</sup> See App. sec. i (1), pp. 478-481, for contrary view.

This absence from the institutions of the American Commonwealth of anything answering to *droit administratif* arrested the observation of de Tocqueville from the first moment when he began his investigations into the characteristics of American democracy. In 1831 he writes to an experienced French judge (*magistrat*), Monsieur De Blossville, to ask both for an explanation of the contrast in this matter between French and American institutions, and also for an authoritative explanation of the general ideas (*notions générales*) governing the *droit administratif* of his country.<sup>1</sup> He grounds his request for information on his own ignorance<sup>2</sup> about this special branch of French jurisprudence, and clearly implies that this want of knowledge is not uncommon among French lawyers.

When we know that a legist of de Tocqueville's genius found it necessary to ask for instruction in the "general ideas" of administrative law, we may safely assume that the topic was one which, even in

<sup>1</sup> de Tocqueville's language is so remarkable and bears so closely on our topic that it deserves quotation: "*Ce qui m'empêche le plus, je vous avoue, de savoir ce qui se fait sur ces différents points en Amérique, c'est d'ignorer, à peu près complètement, ce qui existe en France. Vous savez que, chez nous, le droit administratif et le droit civil forment comme deux mondes séparés, qui ne vivent point toujours en paix, mais qui ne sont ni assez amis ni assez ennemis pour se bien connaître. J'ai toujours reçu dans l'un et suis fort ignorant de ce qui se passe dans l'autre. En même temps que j'ai senti le besoin d'acquérir les notions générales qui me manquent à cet égard, j'ai pensé que je ne pouvais mieux faire que de m'adresser à vous.*"—de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. vii (Correspondance), pp. 67, 68.

<sup>2</sup> This want of knowledge is explainable, if not justifiable. In 1831 de Tocqueville was a youth of not more than twenty-six years of age. There were at that date already to be found books on *droit administratif* written to meet the wants of legal practitioners. But the mass of interesting constitutional literature represented by the writings of Laferrière, Hauriou, Duguit, Jèze, or Berthélemy which now elucidates the theory, and traces the history of a particular and most curious branch of French law, had not come into existence.

Part II. the eyes of a French lawyer, bore an exceptional character, and need not wonder that Englishmen find it difficult to appreciate the nature of rules which are, admittedly, foreign to the spirit and traditions of our institutions. It is, however, this very contrast between administrative law as it exists in France, and still more as it existed during by far the greater part of the nineteenth century, and the notions of equality before the law of the land which are firmly established in modern England, that mainly makes it worth while to study, not of course the details, but what de Tocqueville calls the *notions générales* of French *droit administratif*. Our aim should be to seize the general nature of administrative law and the principles on which the whole system of *droit administratif* depends, to note the salient characteristics by which this system is marked, and, lastly, to make clear to ourselves how it is that the existence of a scheme of administrative law makes the legal situation of every government official in France different from the legal situation of servants of the State in England, and in fact establishes a condition of things fundamentally inconsistent with what Englishmen regard as the due supremacy of the ordinary law of the land.

(1) Nature  
of *droit*  
*adminis-*  
*tratif*.

*Droit administratif*, or "administrative law," has been defined by French authorities in general terms as "the body of rules which regulate the relations "of the administration or of the administrative "authority towards private citizens";<sup>1</sup> and Aucoc in his work on *droit administratif* describes his topic

<sup>1</sup> "On le définit ordinairement l'ensemble des règles qui régissent les "rapports de l'administration ou de l'autorité administrative avec les "citoyens."—Aucoc, *Conférences sur l'Administration et sur le Droit administratif* (3rd ed., 1885), vol. i, Intro., N° 6, p. 15.

in this very general language : <sup>1</sup> " Administrative law " determines (1) the constitution and the relations of " those organs of society which are charged with the " care of those social interests (*intérêts collectifs*) which " are the object of public administration, by which " term is meant the different representatives of society " among which the State is the most important, and " (2) the relation of the administrative authorities " towards the citizens of the State."

These definitions are wanting in precision, and their vagueness is not without significance.<sup>2</sup> As far, however, as an Englishman may venture to deduce the meaning of *droit administratif* from foreign treatises, it may, for our present purpose, be best described as that portion of French law which determines, (i.) the position and liabilities of all State officials, (ii.) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii.) the procedure by which these rights and liabilities are enforced.

An English student will never, it should particularly be noticed, understand this branch of French law unless he keeps his eye firmly fixed upon its historical aspect, and carefully notes the changes, almost amounting to the transformation, which *droit administratif* has undergone between 1800 and 1908, and above all during the last thirty or forty years. The fundamental ideas which underlie this department

<sup>1</sup> " Nous préférons dire, pour notre part : Le droit administratif " détermine : 1<sup>re</sup> la constitution et les rapports des organes de la société " chargés du soin des intérêts collectifs qui font l'objet de l'administration " publique, c'est-à-dire des différentes personnifications de la société, dont " l'Etat est la plus importante ; 2<sup>e</sup> les rapports des autorités administra- " tives avec les citoyens."—*Ibid.*

<sup>2</sup> Cf. p. 478, *post.*

Part II. of French law are, as he will discover, permanent, but they have at various times been developed in different degrees and in different directions. Hence any attempt to compare the administrative law of France with our English rule of law will be deceptive unless we note carefully what are the stages in the law of each country which we bring into comparison. If, for instance, we compare the law of England and the law of France as they stand in 1908, we are likely to fancy (in my judgment erroneously) that, *e.g.* in regard to the position or privileges of the State and its servants when dealing with private citizens, there may be little essential difference between the laws of the two countries. It is only when we examine the administrative law of France at some earlier date, say between 1800 and 1815, or between the accession to the throne of Louis Philippe (1830) and the fall of the Second Empire (1870), that we can rightly appreciate the essential opposition between our existing English rule of law and the fundamental ideas which lie at the basis of administrative law not only in France but in any country where this scheme of State or official law has obtained recognition.

(2) Historical development.

The modern administrative law of France has grown up, or at any rate taken its existing form, during the nineteenth century; it is the outcome of more than a hundred years of revolutionary and constitutional conflict.<sup>1</sup> Its development may conveniently be divided into three periods, marked by the

<sup>1</sup> The author's source of the history of *droit administratif* was in particular: Laferrière. *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. 1, ch. i-iv, pp. 137-301.



names of the Napoleonic Empire and the Restoration (1800-1830), the Orleanist Monarchy and the Second Empire (1830-1870), the Third Republic (1870-1908).

Chapter  
XII.

*First Period.*—Napoleon and the Restoration, 1800-1830. In the opinion of Frenchmen true *droit administratif* owes its origin to the consular constitution of the Year VIII. (1800) created by Bonaparte after the *coup d'état* of the 18th of Brumaire. But legists,<sup>1</sup> no less than historians, admit that the ideas on which *droit administratif* rests, may be rightly traced back, as they have been by de Tocqueville,<sup>2</sup> to the *ancien régime*; every feature of Bonaparte's governmental fabric recalls some characteristic of the ancient monarchy; his *Conseil d'Etat* revives the *Conseil du Roi*, his Prefects are copies of the royal Intendants. Yet in this instance public opinion

Napoleon  
and the  
Restoration.

<sup>1</sup> "Aussi haut que l'on remonte dans notre histoire, depuis que des juridictions régulières ont été instituées, on ne trouve pas d'époque où les corps judiciaires chargés d'appliquer les lois civiles et criminelles aient été en même temps appelés à statuer sur les difficultés en matière d'administration publique."—Laferrière. *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. i, p. 139; cf. bk. 3, ch. vii, p. 640.

<sup>2</sup> "Ce qui apparaît . . . quand on étudie les paperasses administratives, c'est l'intervention continuelle du pouvoir administratif dans la sphère judiciaire. Les légistes administratifs nous disent sans cesse, que le plus grand vice du gouvernement intérieur de l'ancien régime était que les juges administraient. On pourrait se plaindre avec autant de raison de ce que les administrateurs jugeaient. La seule différence est que nous avons corrigé l'ancien régime sur le premier point, et l'avons imité sur le second. J'avais eu jusqu'à présent la simplicité de croire que ce que nous appelons la justice administrative était une création de Napoléon. C'est du pur ancien régime conservé; et le principe que lors même qu'il s'agit de contrat, c'est-à-dire d'un engagement formel et régulièrement pris entre un particulier et l'Etat, c'est à l'Etat à juger la cause, cet axiome, inconnu chez la plupart des nations modernes, était tenu pour aussi sacré par un intendant de l'ancien régime, qu'il pourrait l'être de nos jours par le personnage qui ressemble le plus à celui-là, je veux dire un préfet."—de Tocqueville, *op. cit.*, vol. vi (Correspondance), pp. 221, 222.

Part II. has come to a right conclusion. It was from Bonaparte that modern *droit administratif* received its form. If he was the restorer of the *ancien régime*, he was also the preserver of the Revolution. Whatever he borrowed from the traditions of old France he adapted to the changed conditions of the new France of 1800. At his touch ancient ideas received a new character and a new life. He fused together what was strongest in the despotic traditions of the monarchy with what was strongest in the equally despotic creed of Jacobinism. Nowhere is this fusion more clearly visible than in the methods by which Bonaparte's legislation and policy gave full expression to the ideas or conceptions of royal prerogative underlying the administrative practice of the *ancien régime*, and emphasised the jealousy felt in 1800 by every Frenchman of the least interference by the law courts with the free action of the government. This jealousy itself, though theoretically justified by revolutionary dogma, was inherited by the Revolution from the statecraft of the monarchy.

*Droit administratif*—its two leading principles.

Any one who considers with care the nature of the *droit administratif* of France, or the topics to which it applies, will soon discover that it rests, and always has rested, at bottom on two leading ideas alien to the conceptions of modern Englishmen.

Privileges of the State.

The first of these ideas is that the government, and every servant of the government, possesses, as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal

rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French ideas, stand on anything like the same footing as that on which he stands in dealings with his neighbour.<sup>1</sup>

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Separation  
of powers.

The second of these general ideas is the necessity of maintaining the so-called "separation of powers" (*séparation des pouvoirs*), or, in other words, of preventing the government, the legislature, and the courts from encroaching upon one another's province. The expression, however, separation of powers, as applied by Frenchmen to the relations of the executive and the courts, with which alone we are here concerned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the "independence of the judges," or the like expressions. As interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the

<sup>1</sup> "Un particulier qui n'exécute pas un marché doit à l'entrepreneur une indemnité proportionnée au gain dont il le prive; le Code civil l'établit ainsi. L'administration qui rompt un tel marché ne doit d'indemnité qu'en raison de la perte éprouvée. C'est la règle de la jurisprudence administrative. A moins que le droit ne s'y oppose, elle tient que l'Etat, c'est-à-dire la collection de tous les citoyens, et le trésor public, c'est-à-dire l'ensemble de tous les contribuables, doivent passer avant le citoyen ou le contribuable isolés, défendant un intérêt individuel."—Vivien, *Etudes administratives* (2nd ed., 1852), pp. 140, 141. This was the language of a French lawyer of high authority writing in 1853. The particular doctrine which it contains is now repudiated by French lawyers. Vivien's teaching, however, even though it be no longer upheld, illustrates the general view taken in France of the relation between the individual and the State. That Vivien's application of this view is now repudiated, illustrates the change which French *droit administratif* and the opinion of Frenchmen has undergone during the last fifty-five years.

Part II. principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts.<sup>1</sup> It were curious to follow out the historical growth of the whole theory as to the "separation of powers." It rests apparently upon Montesquieu's *Esprit des Lois*, Book XI. c. 6, and is in some sort the offspring of a double misconception; Montesquieu misunderstood on this point the principles and practice of the English constitution, and his doctrine was in turn, if not misunderstood, exaggerated, and misapplied by the French statesmen of the Revolution. Their judgment was biassed, at once by knowledge of the inconveniences and indeed the gross evils which had resulted from the interference of the French "parliaments" in matters of State and by the belief that these courts would offer opposition, as they had done before, to fundamental and urgently needed reforms. Nor were the leaders of French opinion uninfluenced by the traditional desire, felt as strongly by despotic democrats as by despotic kings, to increase the power of the central government by curbing the authority of the law courts. The investigation, however, into the varying fate of a dogma which has undergone a different development on each side of the Atlantic would lead us too far from our immediate topic. All that we need note is the extraordinary influence exerted in France, and in all countries which have followed French examples, by this part of Montesquieu's

<sup>1</sup> See Aucoc, *Conférences sur l'Administration et sur le Droit administratif* (3rd ed., 1885), vol. i, part i, bk. i, ch. i, Nos 20-24, pp. 47-60.

teaching, and the extent to which it still underlies the political and legal institutions of the French Republic. Chapter XII.

To the combination of these two general ideas may be traced four distinguishing characteristics of French administrative law. Characteristics.

The first of these characteristics is, as the reader will at once perceive, that the relation of the government and its officials towards private citizens must be regulated by a body of rules which are in reality laws, but which may differ considerably from the laws which govern the relation of one private person to another. This distinction between ordinary law and administrative law is one which since 1800 has been fully recognised in France, and forms an essential part of French public law, as it must form a part of the public law of any country where administrative law in the true sense exists.<sup>1</sup> (1) Rights of State determined by special rules.

The second of these characteristics is that the ordinary judicial tribunals which determine ordinary questions, whether they be civil or criminal, between man and man, must, speaking generally, have no concern whatever with matters at issue between a private person and the State, *i.e.* with questions of administrative law, but that such questions, in so far as they form at all matter of litigation (*contentieux administratif*), must be determined by administrative courts in some way connected with the government or the administration. (2) Law Courts without jurisdiction in matters concerning the State and administrative litigation to be determined by administrative courts.

No part of revolutionary policy or sentiment was

<sup>1</sup> Of course it is possible that rules of administrative law may exist in a country, *e.g.* in Belgium, where these rules are enforced only by the ordinary courts.



Part II. more heartily accepted by Napoleon than the conviction that the judges must never be allowed to hamper the action of the government. He gave effect to this conviction in two different ways.

In the first place, he constituted, or reconstituted, two classes of courts. The one class consisted of "judicial" or, as we should say, "common law" courts. They performed, speaking generally, but two functions. The one function was the decision of disputes in strictness between private persons; this duty was discharged by such courts as the courts of First Instance and the courts of appeal. The other function was the trial of all criminal cases; this duty was discharged by such courts as the Correctional Courts (*Tribunaux Correctionnels*) or the Courts of Assize<sup>1</sup> (*Cours d'Assises*). At the head of all these judicial tribunals was placed, and still stands, the Court of Cassation (*Cour de Cassation*), whereof it is the duty to correct the errors in law of the inferior judicial courts.<sup>2</sup> The other class of so-called courts were and are the administrative courts, such as the Courts of the Prefects (*Conseil de Préfecture*)<sup>3</sup> and the *Conseil d'Etat*. The function of these bodies, in so far as they acted judicially (for they fulfilled many duties that were not judicial), was to determine questions of administrative law. The two kinds of courts stood opposed to one another. The judicial courts had, speaking generally,<sup>4</sup> no

<sup>1</sup> The *Cours d'Assises* are the only courts in France where there is trial by jury.

<sup>2</sup> The *Cour de Cassation* is not in strictness a Court of Appeal.

<sup>3</sup> With the Courts, or Councils, of the Prefects an English student need hardly concern himself.

<sup>4</sup> There existed even under Napoleon exceptional instances, and their number has been increased, in which, mainly from motives of

concern with questions of administrative law, or, in other words, with cases in which the interest of the State or its servants was at issue; to entrust any judicial court with the decision of any administrative suit would have been deemed in 1800, as indeed it is still deemed by most Frenchmen, a violation of the doctrine of the separation of powers, and would have allowed the interference by mere judges with cases in which the interest of the State or its servants was at issue. The administrative courts, on the other hand, had, speaking generally, no direct concern with matters which fell within the jurisdiction of the judicial tribunals, but when we come to examine the nature of the *Conseil d'Etat* we shall find that this restriction on the authority of a body which in Napoleon's time formed part of the government itself was far less real than the strict limitations imposed on the sphere of action conceded to the common law courts.

Napoleon, in the second place, displayed towards the ordinary judges the sentiment of contemptuous suspicion embodied in revolutionary legislation. The law of 16-24 August, 1790,<sup>1</sup> is one among a score of examples which betray the true spirit of the Revolution. The judicial tribunals are thereby forbidden to interfere in any way whatever with any

immediate convenience, legislation has given to judicial courts the decision of matters which from their nature should fall within the sphere of the administrative tribunals, just as legislation has exceptionally given to administrative tribunals matters which would naturally fall within the jurisdiction of the judicial courts. These exceptional instances cannot be brought within any one clear principle, and may for our purpose be dismissed from consideration.

<sup>1</sup> Hélie, *Les Constitutions de la France* (1879), ch. i, p. 147 (*Loi des 16-24 Août, 1790*) tit. ii, art. 11-13.

Part II. acts of legislation. Judicial functions, it is laid down, must remain separate from administrative functions. The judges must not, under penalty of forfeiture, disturb or in any way interfere with the operations of administrative bodies, or summon before them administrative officials on account of anything done by reason of their administrative duties. Napoleon had imbibed to the utmost the spirit of these enactments. He held, as even at a much later date did all persons connected with the executive government, that "the judges are the *enemies* of the servants of the State, and that there is always reason to fear their attempts to compromise the public interests by their malevolent, or at best rash, interference in the usual course of government business."<sup>1</sup> This fear was during the Empire, at any rate, assuredly groundless. Administrative officials met with no resistance from the courts. After the Revolution the judges exhibited boundless humility and servile submission, they trembled before the power and obeyed the orders, often insolent enough, of the government.<sup>2</sup> It is difficult, however, to see how in the days of Napoleon the ordinary judges could, whatever their courage or boldness, have interfered with the conduct of the govern-

<sup>1</sup> "On a subi l'influence de ce préjugé dominant chez les gouvernants, dans l'administration et même chez la plupart des jurisconsultes, que les agents judiciaires sont les ennemis nés des agents administratifs, qu'il y a toujours à craindre leurs tentatives de compromettre la chose publique par leur intervention—malveillante ou tout au moins inconsidérée—dans la marche normale de l'administration."—Jèze, *Les principes généraux du Droit administratif* (1st ed., 1904), p. 139.

<sup>2</sup> "Les agents administratifs, dans leur arbitraire véritablement inouï, ne rencontrèrent aucune résistance chez les agents judiciaires. Ceux-ci, après la Révolution, ont montré une humilité sans limite et une soumission servile. C'est en tremblant qu'ils ont toujours obéi aux ordres parfois insolents du Gouvernement."—Jèze, *op. cit.*, p. 128.

ment or its agents. They are even now, as a rule, without jurisdiction in matters which concern the State. They have no right to determine, for instance, the meaning and legal effect in case it be seriously disputed of official documents, as, for example, of a letter addressed by a Minister of State to a subordinate, or by a general to a person under his command. They are even now in certain cases without jurisdiction as to questions arising between a private person and a department of the government. In Napoleon's time<sup>1</sup> they could not, without the consent of the government, have entertained criminal or civil proceedings against an official for a wrong done or a crime committed by such official in respect of private individuals when acting in discharge of his official duties. The incompetence, however, of the judicial courts did not mean, even under Napoleon, that a person injured by an agent of the government was without a remedy. He might bring his grievance before, and obtain redress from, the administrative tribunals, *i.e.* in substance the *Conseil d'Etat*, or proceedings might, where a crime or a wrong was complained of, be, with the permission of the government, taken before the ordinary courts.

The co-existence of judicial courts and of administrative courts results of necessity in raising questions of jurisdiction. *A*, for example, in some judicial court claims damages against *X* for a breach of contract, or it may be for what we should term an assault or false imprisonment. *X*'s defence in substance is that he acted merely as a servant of the

(3) Conflicts of jurisdiction.

<sup>1</sup> Hélie, *Les Constitutions de la France* (1879), ch. iv, p. 583 (Constitution du 22 Frimaire, An VIII.), tit. vi, art. 75.

Part II. State, and that the case raises a point of administrative law determinable only by an administrative tribunal, or, speaking broadly, by the *Conseil d'Etat*. The objection, in short, is that the judicial court has no jurisdiction. How is this dispute to be decided? The natural idea of an Englishman is that the conflict must be determined by the judicial courts, *i.e.* the ordinary judges, for that the judges of the land are the proper authorities to define the limits of their own jurisdiction. This view, which is so natural to an English lawyer, is radically opposed to the French conception of the separation of powers, since it must, if systematically carried out, enable the courts to encroach on the province of the administration. It contradicts the principle still recognised as valid by French law that administrative bodies must never be troubled in the exercise of their functions by any act whatever of the judicial power;<sup>1</sup> nor can an Englishman, who recollects the cases on general warrants, deny that our judges have often interfered with the action of the administration. The worth of Montesquieu's doctrine is open to question, but if his theory be sound, it is clear that judicial bodies ought not to be allowed to pronounce a final judgment upon the limits of their own authority.

Under the legislation of Napoleon the right to determine such questions of jurisdiction was in theory reserved to the head of the State, but was

<sup>1</sup> See Aucoc, *Conférences sur l'Administration et sur le Droit administratif* (3rd ed., 1885), vol. i, part i, bk. i, ch. i, N° 24, pp. 54-60.



in effect given to the *Conseil d'Etat*, that is, to the highest of administrative courts. Its authority in this matter was, as it still is, preserved in two different ways. If a case before an ordinary or judicial court clearly raised a question of administrative law, the court was bound to see that the inquiry was referred to the *Conseil d'Etat* for decision. Suppose, however, the court exceeded, or the government thought that it exceeded, its jurisdiction and trenched upon the authority of the administrative court, a prefect, who, be it remarked, is a mere government official, could raise a conflict, that is to say, could, by taking the proper steps, insist upon the question of jurisdiction being referred for decision to the *Conseil d'Etat*. We can hardly exaggerate the extent of the authority thus conferred upon the *Conseil*. It had the right to fix the limits of its own power, it could in effect take out of the hands of a judicial court a case of which the court was already seised.<sup>1</sup>

The fourth and most despotic characteristic of *droit administratif* lies in its tendency to protect<sup>2</sup> from the supervision or control of the ordinary law courts any servant of the State who is guilty of an act, however illegal, whilst acting in *bona fide* obedi-

(4) Protection of officials.

<sup>1</sup> Up to 1828 it was possible "élever un conflit" in any criminal no less than in any civil case. Nor is it undeserving of notice that, whilst a conflict could be raised in order to prevent a judicial court from encroaching on the sphere of an administrative court, there was in Napoleon's time no legal means for raising a conflict with a view to prevent an administrative court from encroaching on the sphere of a judicial court.

<sup>2</sup> This protection of officials may be displayed in parts of French law (e.g. French Code Pénal, art. 114) which do not technically belong to *droit administratif*, but it is in reality connected with the whole system of administrative law.

Part II. ence to the orders of his superiors and, as far as intention goes, in the mere discharge of his official duties.

Such an official enjoyed from 1800 till 1872 a triple protection (*garantie des fonctionnaires*).

Act of  
State.

In the first place, he could not be made responsible before any court, whether judicial or administrative, for the performance of any act of State (*acte de gouvernement*).

The law of France has always recognised an indefinite class of acts, *i.e.* acts of State, which, as they concern matters of high policy or of public security, or touch upon foreign policy or the execution of treaties, or concern dealings with foreigners, must be left to the uncontrolled discretion of the government, and lie quite outside the jurisdiction of any court whatever. What may be the exact definition of an act of State is even now, it would appear in France, a moot point on which high authorities are not entirely agreed. It is therefore impossible for any one but a French lawyer to determine what are the precise qualities which turn conduct otherwise illegal into an act of State of which no French court could take cognisance. Of recent years the tendency of French lawyers has certainly been to narrow down the sense of an ambiguous term which lends itself easily to the justification of tyranny. We may feel sure, however, that during the Napoleonic era and for long afterwards any transaction on the part of the government or its servants was deemed to be an act of State which was carried out *bona fide* with the object of furthering the interest or the security of the country.

In the second place, the French Penal Code, Art. 114,<sup>1</sup> protected, as it still protects, an official from the penal consequences of any interference with the personal liberty of fellow citizens when the act complained of is done under the orders of his official superior.<sup>2</sup>

Chapter  
XII.

Obedience  
to orders.

In the third place, under the celebrated Article 75<sup>3</sup>

<sup>1</sup> *French Code Pénal*, art. 114: "Lorsqu'un fonctionnaire public, un agent ou un préposé du Gouvernement, aura ordonné ou fait quelque acte arbitraire ou attentatoire soit à la liberté individuelle, soit aux droits civiques d'un ou de plusieurs citoyens, soit à la Charte, il sera condamné à la peine de la dégradation civique."

"Si néanmoins il justifie qu'il a agi par ordre de ses supérieurs pour des objets du ressort de ceux-ci, sur lesquels il leur était dû l'obéissance hiérarchique il sera exempté de la peine, laquelle sera, dans ce cas, appliquée seulement aux supérieurs qui auront donné l'ordre."—With this read Garçon, *Code pénal annoté* (1901-1906), p. 245, and art. 34, p. 87; compare *Code d'Instruction criminelle*, Art. 10; Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 76, 77, pp. 524-527, and generally Duguit, *L'Etat, les gouvernants et les agents* (1903), ch. v, para. 10, pp. 615-634.

<sup>2</sup> None but a French criminalist can pronounce with anything like certainty on the full effect of Art. 114, but Garçon's comment thereon (Garçon, *Code pénal annoté* (1901-1906), pp. 245-255) suggests to an English lawyer that an offender who brings himself within the exemption mentioned in the second clause of the Article, though he may be found guilty of the offence charged, cannot be punished for it under Art. 114, or any other Article of the Penal Code, and that Art. 114 protects a very wide class of public servants. (See Garçon, comment under heads D and E, pp. 249-252, and under G, p. 253, and para. 100, p. 254. Read also Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 75-77, spécial, pp. 504-527; Duguit, *L'Etat, les gouvernants et les agents* (1903), ch. v, para. 10, pp. 615, 634.)

It is difficult for an Englishman to understand how under the *Code Pénal* a prefect, a policeman, or any other servant of the State, acting *bona fide* under the orders of his proper official superior, can be in danger of punishment for crimes such as assault, unlawful imprisonment, and the like.

<sup>3</sup> "Les agents du Gouvernement, autres que les ministres, ne peuvent être poursuivis pour des faits relatifs à leurs fonctions, qu'en vertu d'une décision du conseil d'état: en ce cas, la poursuite a lieu devant les tribunaux ordinaires."—Duguit et Monnier, *Les Constitutions et les principales lois politiques de la France depuis 1789* (1898), Constitution du 22 Frimaire, An. VIII, p. 127.

Part II. of the Constitution of the Year VIII., i.e. of 1800, no official could, without the permission of the *Conseil d'Etat*, be prosecuted, or otherwise be proceeded against, for any act done in relation to his official duties.

The protection given was ample. Article 75 reads indeed as if it applied only to prosecutions, but was construed by the courts so as to embrace actions for damages.<sup>1</sup> Under the Napoleonic Constitution no servant of the State, whether a prefect, a mayor, or a policeman, whose conduct, however unlawful, met with the approval of the government, ran any real risk of incurring punishment or of paying damages for any act which purported to be done in discharge of his official duties.

The effect practically produced by the four characteristics of *droit administratif*, and especially the amount of the protection provided for officials acting in obedience to the orders of their superiors, depends in the main on the answer to one question: What at a given time is found to be the constitution and the character of the *Conseil d'Etat*? Was it then under Napoleon a law court administering judicially a particular branch of French law, or was it a department of the executive government? The answer is plain. The *Conseil*, as constituted or revived by Bonaparte, was the very centre of his whole governmental fabric. It consisted of the most eminent administrators whom Napoleon could gather round him. The members of the *Conseil* were entitled and were bound to give the supreme ruler

<sup>1</sup> See Jacquelin, *Les principes dominants du Contentieux administratif* (1899), part i, tit. ii, ch. iv, p. 127.

advice. The *Conseil*, or some of the Councillors, took part in affairs of all descriptions. It is hardly an exaggeration to say that, subject to the absolute will of Napoleon, the members of the *Conseil* constituted the government. They held office at his pleasure. The Councillors dealt with policy, with questions of administration, with questions of administrative law. In 1800 it is probable that administrative suits were not very clearly separated from governmental business. The *Conseil*, moreover, even when acting judicially, was more of a Ministry than of a court, and when the *Conseil*, acting as a court, had given its decision, or tendered its advice, it possessed no means for compelling the executive to give effect to its decisions. As a matter of fact, years have sometimes elapsed before the executive of the day has thought fit to put the judgments of the *Conseil* into force, and it was not till 1872 that its decisions acquired by law the character of real judgments. It was, moreover, as we have already pointed out, originally the final *Tribunal des Conflits*. It had a right to determine whether a given case did or did not concern administrative law, and therefore whether it fell within its own jurisdiction or within the jurisdiction of the ordinary courts. Thus the state of things which existed in France at the beginning of the nineteenth century bore some likeness to what would be the condition of affairs in England if there were no, or little, distinction between the Cabinet as part of the Privy Council and the Judicial Committee of the Privy Council, and if the Cabinet, in its character of a Judicial Committee, determined all questions arising between the government on the



Part II. one side, and private individuals on the other, and determined them with an admitted reference to considerations of public interest or of political expediency. Nor was any material change produced by the fall of Napoleon. The restored monarchy eagerly grasped the prerogatives created by the Empire. There was even a sort of return to the unrestrained arbitrariness of the Directory. It was not until 1828, that is, within two years of the expulsion of Charles X., that public opinion enforced some restriction on the methods by which the administrative authorities, *i.e.* the government, invaded the sphere of the judicial courts.

There are two reasons why it is worth while to study with care the *droit administratif* of our first period. The administrative law of to-day has been built up on the foundations laid by Napoleon. The courts created by him still exist; their jurisdiction is still defined in accordance, in the main, with the lines which he laid down. True it is that machinery invented to support a scheme of rational absolutism has in later times been used by legists and reformers for the promotion of legal liberty. But it is a fact never to be forgotten that the administrative law of France originated in ideas which favour the prerogatives of the government as the proper defence for the interest of the nation.

Monarchical period.

*Second Period.*—The Orleans Monarchy and the Second Empire 1830-1870.<sup>1</sup>

This period deserves the special attention of

<sup>1</sup> Little account need be taken of the Second Republic, 1848-1851. Its legislative reforms in administrative law did not outlive its brief and troubled duration.

English students. Napoleonic Imperialism was absolutism; the Restoration was reaction; neither admits of satisfactory comparison with any governmental system known to modern England. The forty years, on the other hand, which intervened between the expulsion of Charles X. and the fall of Napoleon III., though marked by three violent changes—the Revolution of 1848, the *coup d'état* of 1851, the overthrow of the Second Empire in 1870—form, as a whole, a time of civil order. During these forty years France was, with the exception of not more than six months, governed under the established law of the land. An age of peaceful progress gives an opening for illuminative comparison between the public law of France and the public law of England. This remark is particularly applicable to the reign of Louis Philippe. He was, in the eyes of Englishmen, above all things, a constitutional king.<sup>1</sup> His Parliamentary ministries, his House of peers, and his House of deputies, the whole framework and the very spirit of his government, seemed to be modelled upon the constitution of England; under his rule the supremacy of the ordinary law of the land, administered by the ordinary law courts, was, as Englishmen supposed, as securely established in France as in England. They learn with surprise, that during the whole of these forty years few, if

<sup>1</sup> His accession to the throne was aided by an obvious, but utterly superficial, analogy between the course of the English Revolution in the seventeenth century and of the great French Revolution in the eighteenth and nineteenth centuries. Louis Philippe, it was supposed, was exactly the man to perform in France the part which William III. had played in England, and close the era of revolution.

Part II. any, legislative or Parliamentary reforms<sup>1</sup> touched the essential characteristics of *droit administratif* as established by Napoleon. It remained, as it still does, a separate body of law, dealt with by administrative courts. With this law the judicial courts continued to have, as they still have, no concern. The introduction of Parliamentary government took from the *Conseil d'Etat*, during the reign of Louis Philippe, many of its political functions. It remained, however, as it does to-day, the great administrative court. It preserved what it does not now retain,<sup>2</sup> the right to define the jurisdiction of the judicial courts. Servants of the State remained in possession of every prerogative or privilege ensured to them by custom or by Napoleonic legislation. *Droit administratif*, in short, retained till 1870 all its essential features. That this was so is apparent from two considerations:—

*First.* The *Conseil d'Etat* never, during the period with which we are concerned, became a thoroughly judicial body.

This indeed is a point on which an English critic must speak with some hesitation. He will remember how easily a Frenchman, even though well acquainted with England, might at the present moment misinterpret the working of English institutions, and imagine, for instance, from the relation of the Lord Chancellor to the Ministry, that the Cabinet, of which the Chancellor is always

<sup>1</sup> It was, however, gradually reformed to a great extent by a process of judicial legislation, i.e. by the *Conseil d'Etat* acting in the spirit of a law court.

<sup>2</sup> This function since 1872 has been performed by the *Tribunal des Conflits*. See App. sec. i (4).—ED.

The *Conseil* not an absolutely judicial body.

a member, could influence the judgment given in an action entered in the Chancery Division of the High Court, whereas, as every Englishman knows, centuries have passed since the Lord Chancellor, when acting as a judge in Chancery, was in the slightest degree guided by the interest or the wishes of the Cabinet. An English critic will also remember that at the present day the *Conseil d'Etat* commands as profound respect as any court in France, and stands in popular estimation on a level with the *Cour de Cassation*—the highest of judicial tribunals—and further, that the repute of the *Conseil* has risen during every year since 1830. Yet, subject to the hesitation which becomes any one who comments on the working of institutions which are not those of his own country, an English lawyer must conclude that between 1830 and 1870 the *Conseil*, while acting as an administrative tribunal, though tending every year to become more and more judicialised, was to a considerable extent an official or governmental body, the members of which, when acting in the discharge of quasi-judicial functions, were likely to be swayed by ministerial or official sentiment. This assertion does not imply that the *Conseil*, consisting of persons of the highest eminence and character, did not aim at doing or did not constantly do justice. What is meant is that the *Conseil's* idea of justice was not likely to be exactly the same as that entertained by judicial or common law courts.

*Secondly.* The legal protection of officials suffered no diminution.

No diminution in protection of officials.

No man could be made liable before any court whatever for carrying out an act of State (*acte*

Part II. *de gouvernement*).<sup>1</sup> And under the rule of Louis Philippe, as under the Second Empire, wide was the extension given, both in theory and in practice, to this indefinite and undefined expression.

In 1832 the Duchesse de Berry attempted to raise a civil war in La Vendée. She was arrested. The king dared not let her leave the country. He would not put on trial the niece of his wife. Republicans and Legitimists alike wished her to be brought before a law court. The one class desired that Caroline Berry should be treated as an ordinary criminal, the other hoped to turn the Duchess into a popular heroine. The case was debated in Parliament again and again. Petitions demanded that she should either be set at liberty or brought before a jury. The government refused to take either course. She was detained in prison until private circumstances deprived her both of credit and of popularity. She was then quietly shipped off to Sicily. The conduct of the government, or in fact of the king, was illegal from beginning to end. The Ministry confessed, through the mouth of Monsieur Thiers, that the law had been violated. A vote of the Chamber of Deputies—not be it noted an act of legislation—supplied; it was held, full justification for a breach of the law.<sup>2</sup> This was the kind of authority ascribed in 1832 by the constitutional Ministers of a constitutional monarch to an act of

<sup>1</sup> See p. 345, ante.

<sup>2</sup> "M. Thiers, dans la séance du 20 juin, avoua hautement tout ce qu'il y avait eu d'illégal dans l'arrestation, la détention, la mise en liberté de la duchesse; c'était à la Chambre à décider si l'on avait agi dans l'intérêt bien entendu du salut public. La Chambre passa à l'ordre du jour."—Grégoire, *Histoire de France et notions d'histoire générale* (1904), vol. i, p. 364. See also *ibid.*, pp. 292-308, 356-364.



State. This most elastic of pleas was, it would seem, the excuse or the defence for the dealings of Napoleon III. with the property of the Orleans family; nor is it easy to believe that even as late as 1880 some of the proceedings against the unauthorised congregations were not examples of the spirit which places an act of State above the law of the land.

The Penal Code, Article 114,<sup>1</sup> protecting from punishment, though not from legal condemnation, an agent of the government who though he committed a crime acted in obedience to the commands of his official superiors, remained, as it still remains, in full force.

The celebrated Article 75 of the Constitution of the Year VIII.,<sup>2</sup> which made it impossible to take legal proceedings for a crime or a wrong against any official without the permission of the *Conseil d'Etat*, which surely in this case must have acted in accordance with the government of the day, still stood unrepealed.

Public opinion refused to regard the *Conseil* as a judicial tribunal, and condemned the protection extended to official wrongdoers. Hear on this point the language of Alexis de Tocqueville:

"In the Year VIII. of the French Republic a constitution was drawn up in which the following clause was introduced: 'Art. 75. All the agents of the government below the rank of ministers can only be prosecuted<sup>3</sup> for offences relating to their

<sup>1</sup> See p. 346, note 1, *ante*.

<sup>2</sup> See p. 350, *ante*.

<sup>3</sup> This term was extended by legal decisions so as to cover actions for damages. See Jacquelin, *Les principes dominants du Contentieux administratif* (1899), part i, tit. ii, ch. iv, p. 127.

## Part II.

“several functions by virtue of a decree of the *Conseil d'Etat*; in which case the prosecution takes place before the ordinary tribunals.’ This clause survived the ‘*Constitution de l’An VIII.*,’ and it is still maintained in spite of the just complaints of the nation. I have always found the utmost difficulty in explaining its meaning to Englishmen or Americans. They were at once led to conclude that the *Conseil d’Etat* in France was a great tribunal, established in the centre of the kingdom, which exercised a preliminary and somewhat tyrannical jurisdiction in all political causes. But when I told them that the *Conseil d’Etat* was not a judicial body, in the common sense of the term, but an administrative council composed of men dependent on the Crown, so that the King, after having ordered one of his servants, called a Prefect, to commit an injustice, has the power of commanding another of his servants, called a Councillor of State, to prevent the former from being punished; when I demonstrated to them that the citizen who has been injured by the order of the sovereign is obliged to solicit from the sovereign permission to obtain redress, they refused to credit so flagrant an abuse, and were tempted to accuse me of falsehood or of ignorance. It frequently happened before the Revolution that a Parliament issued a warrant against a public officer who had committed an offence, and sometimes the proceedings were stopped by the authority of the Crown, which enforced compliance with its absolute and despotic will. It is painful to perceive how much lower we are sunk than our forefathers, since we allow things to pass

"under the colour of justice and the sanction of the law which violence alone could impose upon them."<sup>1</sup>

This classical passage from de Tocqueville's *Democracy in America* was published in 1835, when, at the age of 30, he had obtained a fame which his friends compared to that of Montesquieu. His estimate of *droit administratif* assuredly had not changed when towards the end of his life he published *L'Ancien Régime et la Révolution*, by far the most powerful and the most mature of his works.

"We have, it is true," he writes, "expelled the judicial power from the sphere of government into which the *ancien régime* had most unhappily allowed its introduction, but at the very same time, as any one can see, the authority of the government has gradually been introducing itself into the natural sphere of the courts, and there we have suffered it to remain as if the confusion of powers was not as dangerous if it came from the side of the government as if it came from the side of the courts, or even worse. For the intervention of the courts of Justice into the sphere of government only impedes the management of business, whilst the intervention of government in the administration of justice depraves citizens and turns them at the same time both into revolutionists and slaves."<sup>2</sup>

<sup>1</sup> de Tocqueville, *Democracy in America* (translation by H. Reeve, 1875), vol. i, p. 101; *Œuvres complètes* (14th ed., 1864), vol. i (*Démocratie en Amérique*), pp. 174, 175.

<sup>2</sup> "Nous avons, il est vrai, chassé la justice de la sphère administrative où l'ancien régime l'avait laissée s'introduire fort indûment; mais dans le même temps, comme on le voit, le gouvernement s'introduisait sans cesse dans la sphère naturelle de la justice, et nous l'y avons laissé: comme si la confusion des pouvoirs n'était pas aussi dangereuse de ce côté que de l'autre, et même pire; car l'intervention de la justice dans l'administration ne nuit qu'aux affaires, tandis que l'intervention de

## Part II.

These are the words of a man of extraordinary genius who well knew French history, who was well acquainted with the France of his day, who had for years sat in Parliament, who at least once had been a member of the Cabinet, and to whom the public life of his own country was as well known as the public life of England to Macaulay. de Tocqueville's language may bear marks of an exaggeration, explainable partly by his turn of mind, and partly by the line of thought which made him assiduously study and possibly overrate the closeness of the connection between the weaknesses of modern democracy and the vices of the old monarchy. Be this as it may, he assuredly expressed the educated opinion of his time. A writer who has admirably brought into view the many merits of the *Conseil d'Etat* and the methods by which it has in matters of administrative litigation acquired for itself more and more of a judicial character, acutely notes that till the later part of the nineteenth century the language of everyday life, which is the best expression of popular feeling, applied the terms "courts of justice" or "justice" itself only to the judicial or common law courts.<sup>1</sup> What stronger confirmation can be found of the justice of de Tocqueville's judgment for the time at least in which he lived?

Effect of  
droit ad-  
ministratif  
on position  
of French  
officials.

We can now understand the way in which from 1830 to 1870 the existence of a *droit administratif* affected the whole legal position of French public

"*l'administration dans la justice déprave les hommes et tend à les rendre tout à la fois révolutionnaires et serviles.*"—de Tocqueville, *op. cit.*, vol. iv (Ancien Régime et Révolution), p. 103.

<sup>1</sup> Jèze, *Les principes généraux du Droit administratif* (1st ed., 1904), p. 138, note 1.

servants, and rendered it quite different from that of English officials.

Chapter  
XII.

Persons in the employment of the government, who formed, be it observed, a more important part of the community than do the whole body of English civil servants, occupied in France a situation in some respects resembling that of soldiers in England. For the breach of official discipline they were, we may safely assume, readily punishable in one form or another. But if like English soldiers they were subject to official discipline, they enjoyed what even soldiers in England do not possess, a very large amount of protection against proceedings before the judicial courts for wrongs done to private citizens. The position, for instance, of say a prefect or a policeman, who in the over-zealous discharge of his duties had broken the law by committing an assault or a trespass, was practically unassailable. He might plead that the wrong done was an act of State. If this defence would not avail him he might shelter himself behind Article 114 of the Penal Code, and thus escape not indeed an adverse verdict but the possibility of punishment. But after all, if the Ministry approved of his conduct, he had no need for legal defences. He could not, without the assent of the *Conseil d'Etat*, be called upon to answer for his conduct before any court of law. Article 75 was the palladium of official privilege or irresponsibility. Nor let any one think that this arm of defence had grown rusty with time and could not in practice be used. Between 1852 and 1864 there were 264 applications for authorisations under Article 75 to take proceedings against officials. Only 34 were



Part II. granted, or, in other words, 230 were refused.<sup>1</sup> The manifest injustice of the celebrated Article had been long felt. Even in 1815 Napoleon had promised its modification.

*Third Period.*—The Third Republic—1870-1908.

Within two years from the fall of the Second Empire public opinion insisted upon three drastic reforms in the administrative or official law of France.

Repeal of  
Art. 75.

On the 19th of September, 1870, Article 75 was repealed. It had survived the Empire, the Restoration, the Orleans Monarchy, the Republic of 1848, and the Second Empire. The one thing which astonishes an English critic even more than the length of time during which the celebrated Article had withstood every assault, is the date, combined with the method of its abolition. It was abolished on the 19th of September 1870, when the German armies were pressing on to Paris. It was abolished by a Government which had come into office through an insurrection, and which had no claim to actual power or to moral authority except the absolute necessity for protecting France against invasion. It is passing strange that a provisional government, occupied with the defence of Paris, should have repealed a fundamental principle of French law. Of the motives which led men placed in temporary authority by the accidents of a revolution to carry through a legal innovation which, in appearance at least, alters the whole position of French officials, no foreign observer can form a certain opinion.

<sup>1</sup> See Jacquelin, *Les principes dominants du Contentieux administratif* (1899), part i, tit. ii, ch. iv, p. 128.

It is worth notice that the principle of Article 75 was recognised in more than one State of the old German Empire.

It is, however, a plausible conjecture, confirmed by subsequent events, that the repeal of Article 75 was lightly enacted and easily tolerated, because, as many lawyers may have suspected, it effected a change more important in appearance than in reality, and did not after all gravely touch the position of French functionaries or the course of French administration.<sup>1</sup>

A circumstance which fills an English lawyer with farther amazement is that the repeal of Article 75 became, and still without any direct confirmation by any legislative assembly remains, part of the law of the land. Here we come across an accepted principle of French constitutional law which betrays the immense authority conceded both by the law and by the public opinion of France to any *de facto* and generally accepted government. Such a body, even if like the provisional government of 1848 it is called to office one hardly knows how, by the shouts of a mob consisting of individuals whose names for the most part no one now knows at all, is deemed to possess whilst it continues in power the fullest legislative authority. It is, to use French terms, not only a legislative but a constituent authority. It can issue decrees, known by the technical name of decree

<sup>1</sup> For some confirmation of this view, see Aucoc, *Conférences sur l'Administration et sur le Droit administratif* (3rd ed., 1885), vol. i, bk. v, ch. ii, Nos 419-426, pp. 740-768; Jacquelin, *La Juridiction administrative* (1891), p. 427; Laferrière, *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. iii, ch. vii, pp. 637-664.

The admission, however, involved in the repeal of Article 75 of the general principle that officials are at any rate *prima facie* liable for illegal acts, in the same way as private persons, marks, it is said by competent authorities, an important change in the public opinion of France, and is one among other signs of a tendency to look with jealousy on the power of the State.

Part II. laws (*décrets lois*),<sup>1</sup> which, until regularly repealed by some person or body with acknowledged legislative authority, are often as much law of the land as any Act passed with the utmost formality by the present French National Assembly. Contrast with this ready acceptance of governmental authority the view taken by English Courts and Parliaments of every law passed from 1642 to 1660 which did not receive the Royal assent. Some of them were enacted by Parliaments of a ruler acknowledged both in England and in many foreign countries as the head of the English State; the Protector, moreover, died in peace, and was succeeded without disturbance by his son Richard. Yet not a single law passed between the outbreak of the Rebellion and the Restoration is to be found in the English Statute Book. The scrupulous legalism of English lawyers acknowledged in 1660 no Parliamentary authority but that Long Parliament which, under a law regularly passed and assented to by Charles I., could not be dissolved without its own consent. A student is puzzled whether most to admire or to condemn the sensible but, it may be, too easy acquiescence of Frenchmen in the actual authority of any *de facto* government,

<sup>1</sup> See for the legal doctrine and for examples of such decree laws, Duguit, *Manuel de Droit Public français; Droit Constitutionnel* (1907), para. 141, pp. 1037, 1038; Moreau. *Le règlement administratif* (1902), para. 66, pp. 103, 104. Such decree laws were passed by the provisional government between the 24th of February and the 4th of May, 1848; by Louis Napoleon between the *coup d'état* of 2nd December, 1851, and 29th March, 1852, that is, a ruler who, having by a breach both of the law of the land and of his oaths usurped supreme power, had not as yet received any recognition by a national vote; and lastly, by the Government of National Defence between 4th September, 1870, and 12th February, 1871, that is, by an executive which might in strictness be called a government of necessity.

or the legalism carried to pedantic absurdity of Englishmen, who in matters of statesmanship placed technical legality above those rules of obvious expediency which are nearly equivalent to principles of justice. This apparent digression is in reality germane to our subject. It exhibits the different light in which, even in periods of revolution, Frenchmen and Englishmen have looked upon the rule of law.

The strange story of Article 75 needs a few words more for its completion. The decree law of 19th September, 1870, reads as if it absolutely subjected officials accused of any breach of the law to the jurisdiction of the judicial courts. This, moreover, was in fact the view taken by both the judicial and the administrative courts between 1870 and 1872.<sup>1</sup> But judicial decisions can in France, as elsewhere, frustrate the operation of laws which they cannot repeal. After 1870 proceedings against officials, and officials of all ranks, became frequent. This fact is noteworthy. The government wished to protect its own servants. It brought before the newly constituted *Tribunal des Conflits*<sup>2</sup> a case raising for reconsideration the effect of the decree law of 19th September, 1870. The court held that, though proceedings against officials might be taken without the leave of the *Conseil d'Etat*, yet that the dogma of the separation of powers must still be respected, and that it was for the *Tribunal des Conflits* to determine whether any particular case fell within the jurisdiction of the judicial courts or of the administrative courts, that is in effect of the *Conseil*

<sup>1</sup> See in support of this view, Jacquelin, *Les principes dominants du Contentieux administratif* (1899), part i, tit. ii, ch. iv, pp. 127-144.

<sup>2</sup> See p. 365, *post*.

Part II. *d'Etat*.<sup>1</sup> The principle of this decision has now obtained general acceptance. Thus a judgment grounded on that doctrine of the separation of powers which embodies traditional jealousy of interference by ordinary judges in affairs of State has, according at any rate to one high authority, reduced the effect of the repeal of Article 75 almost to nothing. "To sum the matter up," writes Duguit, "the only difference between the actual system and that which existed under the Constitution of the Year VIII. is that before 1870 the prosecution of State officials was subject to the authorisation of the *Conseil d'Etat*, whilst to-day it is subject to the authorisation of the *Tribunal des Conflits*."<sup>2</sup>

(2) Decisions of *Conseil d'Etat* become judgments.

Under the law of 24th May, 1872,<sup>3</sup> the decisions of the *Conseil d'Etat* concerning cases of administrative law received for the first time the obligatory force of judgments. They had hitherto been in theory, and from some points of view even in practice, as already pointed out,<sup>4</sup> nothing but advice given to the head of the State.

(3) Creation of independent Conflict-Court.

The same law<sup>5</sup> which enhanced the authority of the *Conseil's* decisions diminished its jurisdiction.

<sup>1</sup> See *Pelletier's Case*, decided 26th July, 1873: and in support of an interpretation of the law which has now received general approval, Laferrière, i, pp. 637-654; Berthélemy, *Traité élémentaire de Droit administratif* (5th ed., 1908), p. 65; Duguit, *Manuel de Droit Public français*; *Droit Constitutionnel* (1907), para. 67, pp. 463, 464; Jèze, *Les principes généraux du Droit administratif* (1st ed., 1904), pp. 133-135.

<sup>2</sup> "Finalement la seule différence entre le système actuel et celui de la constitution de l'an VIII., c'est qu'avant 1870 la poursuite contre les fonctionnaires était subordonnée à l'autorisation du Conseil d'Etat, et qu'aujourd'hui elle est subordonnée à l'autorisation du tribunal des conflits."—Duguit, *op. cit.* (1907), para. 67, p. 464.

<sup>3</sup> Sect. 9.

<sup>4</sup> See p. 349, *ante*.

<sup>5</sup> Law of 24th May, 1872, Tit. iv, art. 25-28.



The *Conseil* had, since 1800, decided whether a given case, or a point that might arise in a given case, fell within the jurisdiction of the judicial courts or of the administrative courts, *i.e.* in substance of the *Conseil* itself. This authority or power was, in 1872, transferred to a separate and newly constituted *Tribunal des Conflits*.<sup>1</sup>

This *Tribunal des Conflits* has been carefully constituted so as to represent equally the authority of the *Cour de Cassation*—the highest judicial court in France—and the authority of the *Conseil d'Etat*—the highest administrative court in France. It consists of nine members:—three members of the *Cour de Cassation* elected by their colleagues; three members of the *Conseil d'Etat*, also elected by their colleagues; two other persons elected by the above six judges of the *Tribunal des Conflits*. All these eight members of the court hold office for three years. They are re-eligible, and are almost invariably re-elected. The Minister of Justice (*garde des sceaux*) for the time being, who is a member of the Ministry, is *ex officio* President of the court. He rarely attends. The court elects from its own members a Vice-President who generally presides.<sup>2</sup> The *Tribunal des Conflits* comes near to an absolutely judicial body; it commands, according to the best authorities, general confidence. But its connection with the Government of the day through the Minister of Justice (who is

<sup>1</sup> Such a separate *Tribunal des Conflits* had been created under the Second Republic, 1848-1851. It fell to the ground on the fall of the Republic itself in consequence of the *coup d'état* of 1851.

<sup>2</sup> See Berthélemy, *Traité élémentaire de Droit administratif* (10th ed., 1930), p. 1077. For present constitution of *Tribunal des Conflits*, see App. sec. i (4), p. 501, *post.*—ED.

Part II. not necessarily a lawyer) being its President, and the absence on the part of its members of that permanent tenure of office,<sup>1</sup> which is the best security for perfect judicial independence, are defects, which, in the opinion of the fairest among French jurists, ought to be removed,<sup>2</sup> and which, as long as they exist, detract from the judicial character of the *Tribunal des Conflits*. An Englishman, indeed, can hardly fail to surmise that the court must still remain a partly official body which may occasionally be swayed by the policy of a Ministry, and still more often be influenced by official or governmental ideas. Nor is this suspicion diminished by the knowledge that a Minister of Justice has within the year 1908 defended his position as President of the Court on the ground that it ought to contain some one who represents the interests of the government.<sup>3</sup>

The reforms the result of evolution of droit administratif.

These three thorough-going reforms were carried out by legislative action. They obviously met the requirements of the time.<sup>4</sup> They were rapid; they appeared to be sudden. This appearance is delusive. They were in reality the outcome of a slow but continuous revolution in French public opinion and also

<sup>1</sup> A member of the *Conseil d'Etat* does not hold his position as Councillor for life. He may be removed from the *Conseil* by the Government. But no Councillor has been removed since 1875.

<sup>2</sup> Laferrière, *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. prélim., ch. i, p. 24; Chardon, *L'Administration de la France—les fonctionnaires* (1908), p. 4, note 2; Jèze, *Les principes généraux du Droit administratif* (1st ed., 1904), pp. 133, 134.

<sup>3</sup> See Jèze, *Revue de Droit public*, vol. xxv (1908), p. 257.

<sup>4</sup> They were either tacitly sanctioned (decree law of 19th September, 1870) or enacted (law of 24th May, 1872) even before the formal establishment of the Republic (1875) by a National Assembly of which the majority were so far from being revolutionists, or even reformers, that they desired the restoration of the monarchy.

of the perseverance with which the legists of the *Conseil d'Etat*, under the guidance of French jurisprudence and logic, developed out of the arbitrariness of administrative practice a fixed system of true administrative law. To understand this evolution of *droit administratif* during the lapse of more than a century (1800-1908) we must cast a glance over the whole development of this branch of French law and regard it in the light in which it presents itself, not so much to an historian of France as to a lawyer who looks upon the growth of French public law from an historical point of view. We shall then see that the years under consideration fall into three periods or divisions.<sup>1</sup> They are :—

(i.) The period of unnoticed growth, 1800-18 (*Période d'élaboration secrète*). During these years the *Conseil*, by means of judicial precedents, created a body of maxims, in accordance with which the *Conseil* in fact acted when deciding administrative disputes.

(ii.) The period of publication, 1818-60 (*Période de divulgation*). During these forty-two years various reforms were carried out, partly by legislation, but, to a far greater extent, by judge-made law. The judicial became more or less separated off from the administrative functions of the *Conseil*. Litigious business (*le contentieux administratif*) was in practice assigned to and decided by a special committee (*section*), and, what is of equal consequence, such business was

<sup>1</sup> See Hauriou, *Précis de Droit administratif* (3rd ed., 1897), pp. 245-268. These periods do not precisely correspond with the three eras marked by political changes in the annals of France under which have already been considered (see p. 334, *ante*) the history of *droit administratif*.

Part II. decided by a body which acted after the manner of a court which was addressed by advocates, heard arguments, and after public debate delivered judicial decisions. These decisions were reported, became the object of much public interest, and were, after a manner with which English lawyers are well acquainted, moulded into a system of law. The judgments, in short, of the *Conseil* acquired the force of precedent. The political revolutions of France, which have excited far too much notice, whilst the uninterrupted growth of French institutions has received too little attention, sometimes retarded or threw back, but never arrested the continuous evolution of *droit administratif*; even under the Second Empire this branch of French jurisprudence became less and less arbitrary and developed more and more into a system of fixed and subtle legal rules.

(iii.) The period of organisation, 1860-1908 (*Période d'organisation*). During the last forty-eight years, marked as they have been in France by the change from the Empire to a Republic, by the German invasion, and by civil war, the development of *droit administratif* has exhibited a singular and tranquil regularity. Sudden innovations have been rare and have produced little effect. The reforms introduced by the decree law of 19th September, 1870, and by the law of 24th May, 1872, are, taken together, considerable; but they in reality give effect to ideas which had since 1800 more or less guided the judicial legislation and practice both of the *Conseil d'Etat* and of the *Cour de Cassation*. If the legal history of France since 1800 be looked at as a whole, an Englishman may reasonably conclude

that the arbitrary authority of the executive as it existed in the time of Napoleon, and even as it was exercised under the reign of Louis Philippe or of Louis Napoleon, has gradually, as far as the jurisdiction of the administrative courts is concerned, been immensely curtailed, if not absolutely brought to an end. *Droit administratif*, though administered by bodies which are perhaps not in strictness courts, and though containing provisions not reconcilable with the modern English conception of the rule of law, comes very near to law, and is utterly different from the capricious prerogatives of despotic power.

Chapter  
XII.

A comparison between the administrative law of France and our English rule of law, if taken from the right point of view, suggests some interesting points of likeness, no less than of unlikeness.

(B) Comparison between *droit administratif* and rule of law.

It will be observed that it is "modern" English notions which we have contrasted with the ideas of administrative law prevalent in France and other continental states. The reason why the opposition between the two is drawn in this form deserves notice. At a period which historically is not very remote from us, the ideas as to the position of the Crown which were current, if not predominant in England, bore a very close analogy to the doctrines which have given rise to the *droit administratif* of France.<sup>1</sup> Similar beliefs moreover necessarily produced similar results, and there was a time when it must have seemed possible that what we now call administrative law should become a permanent part of

I. Likeness.  
1st Point.  
*Droit administratif* not opposed to English ideas current in sixteenth and seventeenth centuries.

<sup>1</sup> This is illustrated by the similarity between the views at one time prevailing both in England and on the continent as to the relation between the Government and the press. See pp. 259-264, *ante*.



Part II. English institutions. For from the accession of the Tudors till the final expulsion of the Stuarts the Crown and its servants maintained and put into practice, with more or less success and with varying degrees of popular approval, views of government essentially similar to the theories which under different forms have been accepted by the French people. The personal failings of the Stuarts and the confusion caused by the combination of a religious with a political movement have tended to mask the true character of the legal and constitutional issues raised by the political contests of the seventeenth century. A lawyer, who regards the matter from an exclusively legal point of view, is tempted to assert that the real subject in dispute between statesmen such as Bacon and Wentworth on the one hand, and Coke or Eliot on the other, was whether a strong administration of the continental type should, or should not, be permanently established in England. Bacon and men like him no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of despotism. But advocates of the prerogative did not (it may be supposed) intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were struck with the evils flowing from the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes. They wished, in short, to give the government the sort of rights conferred on a foreign executive by the principles of administrative law. Hence for each feature of French *droit administratif* one may find some

curious analogy either in the claims put forward or in the institutions favoured by the Crown lawyers of the seventeenth century.

The doctrine, propounded under various metaphors by Bacon, that the prerogative was something beyond and above the ordinary law is like the foreign doctrine that in matters of high policy (*acte de gouvernement*) the administration has a discretionary authority which cannot be controlled by any court. The celebrated dictum that the judges, though they be "lions," yet should be "lions under the throne, being circumspect that they do not check or oppose any points of sovereignty,"<sup>1</sup> is a curious anticipation of the maxim formulated by French revolutionary statesmanship that the judges are under no circumstances to disturb the action of the administration, and would, if logically worked out, have led to the exemption of every administrative act, or, to use English terms, of every act alleged to be done in virtue of the prerogative, from judicial cognisance. The constantly increasing power of the Star Chamber and of the Council gave practical expression to prevalent theories as to the Royal prerogative, and it is hardly fanciful to compare these courts, which were in reality portions of the executive government, with the *Conseil d'Etat* and other *Tribunaux administratifs* of France. Nor is a parallel wanting to the celebrated Article 75 of the Constitution of the Year VIII.<sup>2</sup> This parallel is to be found in Bacon's attempt to prevent the judges by means of the writ *De non procedendo Rege inconsulto*

<sup>1</sup> Gardiner, *History of England*, vol. iii (1883), p. 2.

<sup>2</sup> See pp. 347, 348, *ante*.

## Part II.

from proceeding with any case in which the interests of the Crown were concerned. "The working of this writ," observes Mr. Gardiner, "if Bacon had obtained his object, would have been, to some extent, analogous to that provision which has been found in so many French constitutions, according to which no agent of the Government can be summoned before a tribunal, for acts done in the exercise of his office, without a preliminary authorisation by the *Conseil d'Etat*. The effect of the English writ being confined to cases where the King was himself supposed to be injured, would have been of less universal application, but the principle on which it rested would have been equally bad."<sup>1</sup> The principle moreover admitted of unlimited extension, and this, we may add, was perceived by Bacon. "The writ," he writes to the King, "is a mean provided by the ancient law of England to bring any case that may concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England, by the ordinary and legal part of this power. And your Majesty knoweth your Chancellor is ever a principal counsellor and instrument of monarchy, of immediate dependence on the king; and therefore like to be a safe and tender guardian of the regal rights."<sup>2</sup> Bacon's innovation would, if successful, have formally established the fundamental dogma of administrative law, that administrative questions must be determined by administrative bodies.

The analogy between the administrative ideas

<sup>1</sup> Gardiner, *op. cit.*, vol. iii (1883), p. 7, note 2.

<sup>2</sup> Abbott, *Francis Bacon* (1885), p. 234.

which still prevail on the Continent<sup>1</sup> and the conception of the prerogative which was maintained by the English crown in the seventeenth century has considerable speculative interest. That the administrative ideas supposed by many French writers to have been originated by the statesmanship of the great Revolution or of the first Empire are to a great extent developments of the traditions and habits of the French monarchy is past a doubt, and it is a curious inquiry how far the efforts made by the Tudors or Stuarts to establish a strong government were influenced by foreign examples. This, however, is a problem for historians. A lawyer may content himself with noting that French history throws light on the causes both of the partial success and of the ultimate failure of the attempt to establish in England a strong administrative system. The endeavour had a partial success, because circumstances, similar to those which made French monarchs ultimately despotic, tended in England during the sixteenth and part of the seventeenth century to augment the authority of the Crown. The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions.

*Droit administratif* is in its contents utterly unlike any branch of modern English law, but in the method of its formation it resembles English law

2nd Point.  
*Droit administratif* is case-law.

<sup>1</sup> It is worth noting that the system of "administrative law," though more fully judicialised in France than elsewhere, exists in one form or another in most of the Continental States.

Part II. far more closely than does the codified civil law of France. For *droit administratif* is, like the greater part of English law, "case-law," or "judge-made law."<sup>1</sup> The precepts thereof are not to be found in any code; they are based upon precedent: French lawyers cling to the belief that *droit administratif* cannot be codified, just as English and American lawyers maintain, for some reason or other which they are never able to make very clear, that English law, and especially the common law, does not admit of codification. The true meaning of a creed which seems to be illogical because its apologists cannot, or will not, give the true grounds for their faith, is that the devotees of *droit administratif* in France, in common with the devotees of the common law in England, know that the system which they each admire is the product of judicial legislation, and dread that codification might limit, as it probably would, the essentially legislative authority of the *tribunaux administratifs* in France, or of the judges in England. The prominence further given throughout every treatise on *droit administratif* to the *contentieux administratif* recalls the importance in English law-books given to matters of procedure. The cause is in each case the same, namely, that French jurists and English lawyers are each dealing with a system of law based on precedent.

Nor is it irrelevant to remark that the *droit administratif* of France, just because it is case-law based on precedents created or sanctioned by

<sup>1</sup> See Dicey, *Law and Opinion in England* (2nd ed., 1914), Lecture XI. (p. 361), and App. sec. i (4), *post*. Dicey suspected that English lawyers underrated the influence at the present day exerted by precedent (jurisprudence) in French courts.—Ed.



tribunals, has, like the law of England, been profoundly influenced by the writers of text-books and commentaries. There are various branches of English law which have been reduced to a few logical principles by the books of well-known writers. Stephen transformed pleading from a set of rules derived mainly from the experience of practitioners into a coherent logical system. Private international law, as understood in England at the present day, has been developed under the influence first of Story's *Commentaries on the Conflict of Laws*, and next, at a later date, of Mr. Westlake's *Private International Law*. And the authority exercised in every field of English law by these and other eminent writers has in France been exerted, in the field of administrative law, by authors or teachers such as Cormenin, Macarel, Vivien, Laferrière, and Hauriou. This is no accident. Wherever courts have power to form the law, there writers of text-books will also have influence. Remark too that, from the very nature of judge-made law, Reports have in the sphere of *droit administratif* an importance equal to the importance which they possess in every branch of English law, except in the rare instances in which a portion of our law has undergone codification.

But in the comparison between French *droit administratif* and the law of England a critic ought not to stop at the points of likeness arising from their each of them being the creation of judicial decisions. There exists a further and very curious analogy between the process of their historical development. The *Conseil d'Etat* has been converted from an executive into a judicial or quasi-judicial body

3rd point.  
Evolution  
of *droit*  
*adminis-*  
*tratif*.

Part II. by the gradual separation of its judicial from its executive functions through the transference of the former to committees (*sections*), which have assumed more and more distinctly the duties of courts. These "judicial committees" (to use an English expression) at first only advised the *Conseil d'Etat* or the whole executive body, though it was soon understood that the Council would, as a general rule, follow or ratify the decision of its judicial committees. This recalls to a student of English law the fact that the growth of our whole judicial system may historically be treated as the transference to parts of the King's Council of judicial powers originally exercised by the King in Council; and it is reasonable to suppose that the rather ill-defined relations between the *Conseil d'Etat* as a whole, and the *Comité du contentieux*,<sup>1</sup> may explain to a student the exertion, during the earlier periods of English history, by the King's Council, of hardly distinguishable judicial and executive powers; it explains also how, by a natural process which may have excited very little observation, the judicial functions of the Council became separated from its executive powers, and how this differentiation of functions gave birth at last to courts whose connection with the political executive was merely historical. This process, moreover, of differentiation assisted at times, in France no less than in England, by legislation, has of quite recent years changed the *Conseil d'Etat* into a real tribunal of *droit administratif*, as it created in England the Judicial Committee of the Privy Council for the regular and judicial decision of

<sup>1</sup> See Laferrière, *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. i, ch. iii, p. 236.

appeals from the colonies to the Crown in Council. Nor, though the point is a minor one, is it irrelevant to note that, as the so-called judgments of the *Conseil d'Etat* were, till 1872, not strictly "judgments," but in reality advice on questions of *droit administratif* given by the *Conseil d'Etat* to the head of the Executive, and advice which he was not absolutely bound to follow, so the "judgments" of the Privy Council, even when acting through its judicial committee, though in reality judgments, are in form merely humble advice tendered by the Privy Council to the Crown. This form, which is now a mere survival, carries us back to an earlier period of English constitutional history, when the interference by the Council, *i.e.* by the executive, with judicial functions, was a real menace to that supremacy of the law which has been the guarantee of English freedom, and this era in the history of England again is curiously illustrated by the annals of *droit administratif* after the restoration of the Bourbons, 1815-30.

At that date the members of the *Conseil d'Etat*, as we have seen,<sup>1</sup> held, as they still hold, office at the pleasure of the Executive; they were to a great extent a political body; there existed further no Conflict-Court; or rather the *Conseil d'Etat* was itself the *Tribunal des Conflits*, or the body which determined the reciprocal jurisdiction of the ordinary law courts and of the administrative courts, *i.e.* speaking broadly, the extent of the Council's own jurisdiction. The result was that the *Conseil d'Etat* used its powers to withdraw cases from the decision of the law courts, and this at a time when government functionaries

<sup>1</sup> See p. 348, *ante*.

Part II. were fully protected by Article 75 of the Constitution of the Year VIII. from being made responsible before the courts for official acts done in excess of their legal powers. Nevertheless, the *Conseil d'Etat*, just because it was to a great extent influenced by legal ideas, resisted, and with success, exertions of arbitrary power inspired by the spirit of Royalist reaction. It upheld the sales of the national domain made between 1789 and 1814; it withstood every attempt to invalidate decisions given by administrative authorities during the period of the Revolution or under the Empire. The King, owing, it may be assumed, to the judicial independence displayed by the *Conseil d'Etat*, took steps which were intended to transfer the decision of administrative disputes from the Council or its committees, acting as courts, to Councillors, acting as part of the executive. Ordinances of 1814 and of 1817 empowered the King to withdraw any administrative dispute which was connected with principles of public interest (*toutes les affaires du contentieux de l'administration qui se lieraient à des vues d'intérêt général*) from the jurisdiction of the *Conseil d'Etat* and bring it before the Council of Ministers or, as it was called, the *Conseil d'en haut*, and the general effect of this power and of other arrangements, which we need not follow out into detail, was that questions of *droit administratif*, in the decision of which the government were interested, were ultimately decided, not even by a quasi-judicial body, but by the King and his Ministers, acting avowedly under the bias of political considerations.<sup>1</sup> In 1828 France insisted upon and obtained

<sup>1</sup> See Laferrière, *Traité de la Juridiction administrative et des recours*

from Charles X. changes in procedure which diminished the arbitrary power of the Council.<sup>1</sup> But no one can wonder that Frenchmen feared the increase of arbitrary power, or that French liberals demanded, after the Revolution of 1830, the abolition of administrative law and of administrative courts. They felt towards the jurisdiction of the *Conseil d'Etat* the dread entertained by Englishmen of the sixteenth and seventeenth centuries with regard to the jurisdiction of the Privy Council, whether exercised by the Privy Council itself, by the Star Chamber, or even by the Court of Chancery. In each country there existed an appreciable danger lest the rule of the prerogative should supersede the supremacy of the law.

The comparison is in many ways instructive; it impresses upon us how nearly it came to pass that something very like administrative law at one time grew up in England. It ought, too, to make us perceive that such law, if it be administered in a judicial spirit, has in itself some advantages. It shows us also the inherent danger of its not becoming in strictness law at all, but remaining, from its close connection with the executive, a form of arbitrary power above or even opposed to the regular law of the land. It is certain that in the sixteenth and seventeenth centuries the jurisdiction of the Privy Council and even of the Star Chamber, odious as its name has remained, did confer some benefits on the public. It should always be remembered that the patriots who resisted the tyranny of the Stuarts were fanatics for *contentieux* (2nd ed., 1896), vol. i, bk. i, ch. iii, pp. 226-234, and Cornemine, *Le Conseil d'Etat envisagé comme Conseil et comme Juridiction dans notre Monarchie constitutionnelle* (1818).

<sup>1</sup> Ordinance of 1st June, 1828, Laferrière, *op. cit.*, vol. i, p. 232.



Part II. the common law, and could they have seen their way to do so would have abolished the Court of Chancery no less than the Star Chamber. The Chancellor, after all, was a servant of the Crown holding his office at the pleasure of the King, and certainly capable, under the plea that he was promoting justice or equity, of destroying the certainty no less than the formalism of the common law. The parallel therefore between the position of the English puritans, or whigs, who, during the seventeenth century, opposed the arbitrary authority of the Council, and the position of the French liberals who, under the Restoration (1815-30), resisted the arbitrary authority of the *Conseil d'Etat* and the extension of *droit administratif*, is a close one. In each case, it may be added, the friends of freedom triumphed.

The result, however, of this triumph was, it will be said, as regards the matter we are considering, markedly different. Parliament destroyed, and destroyed for ever, the arbitrary authority of the Star Chamber and of the Council, and did not suffer any system of administrative courts or of administrative law to be revived or developed in England. The French liberals, on the expulsion of the Bourbons, neither destroyed the *tribunaux administratifs* nor made a clean sweep of *droit administratif*.

The difference is remarkable, yet any student who looks beyond names at things will find that even here an obvious difference conceals a curious element of fundamental resemblance. The Star Chamber was abolished; the arbitrary jurisdiction of the Council disappeared, but the judicial authority of the Chancellor was touched neither by the Long Parliament

nor by any of the Parliaments which met yearly after the Revolution of 1688. The reasons for this difference are not hard to discover. The law administered by the Lord Chancellor, or, in other words, Equity, had in it originally an arbitrary or discretionary element, but it in fact conferred real benefits upon the nation and was felt to be in many respects superior to the common law administered by the common-law Judges. Even before 1660 acute observers might note that Equity was growing into a system of fixed law. Equity, which originally meant the discretionary, not to say arbitrary interference of the Chancellor, for the avowed and often real purpose of securing substantial justice between the parties in a given case, might, no doubt, have been so developed as to shelter and extend the despotic prerogative of the Crown. But this was not the course of development which Equity actually followed; at any rate from the time of Lord Nottingham (1673) it was obvious that Equity was developing into a judicial system for the application of principles which, though different from those of the common law, were not less fixed. The danger of Equity turning into the servant of despotism had passed away, and English statesmen, many of them lawyers, were little likely to destroy a body of law which, if in one sense an anomaly, was productive of beneficial reforms. The treatment of *droit administratif* in the nineteenth century by Frenchmen bears a marked resemblance to the treatment of Equity in the seventeenth century by Englishmen. *Droit administratif* has been the subject of much attack. More than one publicist of high reputation has

Part II. advocated its abolition, or has wished to transfer to the ordinary or civil courts (*tribunaux judiciaires*) the authority exercised by the administrative tribunals, but the assaults upon *droit administratif* have been repulsed, and the division between the spheres of the judicial and the spheres of the administrative tribunals has been maintained. Nor, again, is there much difficulty in seeing why this has happened. *Droit administratif* with all its peculiarities, and administrative tribunals with all their defects, have been suffered to exist because the system as a whole is felt by Frenchmen to be beneficial. Its severest critics concede that it has some great practical merits, and is suited to the spirit of French institutions. Meanwhile *droit administratif* has developed under the influence rather of lawyers than of politicians; it has during the last half-century and more to a great extent divested itself of its arbitrary character, and is passing into a system of more or less fixed law administered by real tribunals; administrative tribunals indeed still lack some of the qualities, such as complete independence of the Government, which Englishmen and many Frenchmen also think ought to belong to all courts, but these tribunals are certainly very far indeed from being mere departments of the executive government. To any person versed in the judicial history of England, it would therefore appear to be possible, or even probable, that *droit administratif* may ultimately, under the guidance of lawyers, become, through a course of evolution, as completely a branch of the law of France (even if we use the word "law" in its very strictest sense)

as Equity has for more than two centuries become an acknowledged branch of the law of England.

Chapter  
XII.

The annals of *droit administratif* during the nineteenth century elucidate again a point in the earlier history of English law which excites some perplexity in the mind of a student, namely, the rapidity with which the mere existence and working of law courts may create or extend a system of law. Any reader of the *History of English Law* by Pollock and Maitland may well be surprised at the rapidity with which the law of the King's Court became the general or common law of the land. This legal revolution seems to have been the natural result of the vigorous exertion of judicial functions by a court of great authority. Nor can we feel certain that the end attained was deliberately aimed at. It may, in the main, have been the almost undesigned effect of two causes: the first is the disposition always exhibited by capable judges to refer the decision of particular cases to general principles, and to be guided by precedent; the second is the tendency of inferior tribunals to follow the lead given by any court of great power and high dignity. Here, in short, we have one of the thousand illustrations of the principle developed in M. Tarde's *Lois de l'imitation*, that the innate imitativeness of mankind explains the spread, first, throughout one country, and, lastly, throughout the civilised world, of any institution or habit on which success or any other circumstance has conferred prestige. It may still, however, be urged that the creation under judicial influence of a system of law is an achievement which requires for its performance a consider-

4th Point.  
Rapid  
growth of  
case-law.

**Part II.** able length of time, and that the influence of the King's Court in England in moulding the whole law of the country worked with incredible rapidity. It is certainly true that from the Norman Conquest to the accession of Edward I. (1066-1272) is a period of not much over two centuries, and that by 1272 the foundations of English law were firmly laid; whilst if we date the organisation of our judicial system from the accession of Henry II. (1154), we might say that a great legal revolution was carried through in not much more than a century. It is at this point that the history of *droit administratif* helps the student of comparative law.

One need not, however, be greatly astonished at rapidity in the development of legal principles and of legal procedure at a period when the moral influence or the imaginative impressiveness of powerful tribunals was much greater than during the later stages of human progress. In any case it is certain—and the fact is a most instructive one—that under the conditions of modern civilisation a whole body of legal rules and maxims, and a whole system of quasi-judicial procedure, have in France grown up within not much more than a century. The expression “grown up” is here deliberately used; (the development of *droit administratif* between 1800 and 1908 resembles a natural process. It is as true of this branch of French law as of the English constitution that it “has not been made but has grown.”)

An intelligent student soon finds that *droit administratif* contains rules as to the status, the privileges, and the duties of government officials. He therefore thinks he can identify it with the

II. Unlike-  
ness.  
1st Point.  
*Droit ad-  
ministratif*  
not to be  
identified  
with any  
part of law  
of England.



laws, regulations, or customs which in England determine the position of the servants of the Crown, or (leaving the army out of consideration) of the Civil Service. Such "official law" exists, though only to a limited extent, in England no less than in France, and it is of course possible to identify and compare this official law of the one country with the official law of the other. But further investigation shows that official law thus understood, though it may form part of, is a very different thing from *droit administratif*. The law, by whatever name we term it, which regulates the privileges or disabilities of civil servants is the law of a class, just as military law is the law of a class, namely, the army. But *droit administratif* is not the law of a class, but—a very different thing—a body of law which, under given circumstances, may affect the rights of any French citizen, as for example, where an action is brought by *A* against *X* in the ordinary courts (*tribunaux judiciaires*), and the rights of the parties are found to depend on an administrative act (*acte administratif*), which must be interpreted by an administrative tribunal (*tribunal administratif*). In truth, *droit administratif* is not the law of the Civil Service, but is that part of French public law which affects every Frenchman in relation to the acts of the public administration as the representative of the State. The relation indeed of *droit administratif* to the ordinary law of France may be best compared not with the relation of the law governing a particular class (e.g. military law) to the general law of England, but with the relation of Equity to the common law of England. The point of likeness.

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Part II. slight though in other respects it be, is that *droit administratif* in France and Equity in England each constitute a body of law which differs from the ordinary law of the land, and under certain circumstances modifies the ordinary civil rights of every citizen.

When our student finds that *droit administratif* cannot be identified with the law of the Civil Service, he naturally enough imagines that it may be treated as the sum of all the laws which confer special powers and impose special duties upon the administration, or, in other words, which regulate the functions of the Government. Such laws, though they must exist in every country, have till recently been few in England, simply because in England the sphere of the State's activity has, till within the last fifty or sixty years, been extremely limited. But even in England laws imposing special functions upon government officials have always existed, and the number thereof has of late vastly increased; to take one example among a score, the Factory legislation, which has grown up mainly during the latter half of the nineteenth century, has, with regard to the inspection and regulation of manufactories and workshops, given to the Government and its officials wide rights, and imposed upon them wide duties. If, then, *droit administratif* meant nothing more than the sum of all the laws which determine the functions of civil servants, *droit administratif* might be identified in its general character with the governmental law of England. The idea that such an identification is possible is encouraged by the wide definitions of *droit administratif* to be gathered from French works of

authority,<sup>1</sup> and by the vagueness with which English writers occasionally use the term "administrative law." But here, again, the attempted identification breaks down. *Droit administratif*, as it exists in France, is not the sum of the powers possessed or of the functions discharged by the administration; it is rather the sum of the principles which govern the relation between French citizens, as individuals, and the administration as the representative of the State. Here we touch upon the fundamental difference between English and French ideas. In England the powers of the Crown and its servants may from time to time be increased as they may also be diminished. But these powers, whatever they are, must be exercised in accordance with the ordinary common law principles which govern the relation of one Englishman to another.<sup>2</sup> A factory inspector, for example, is possessed of peculiar powers conferred upon him by Act of Parliament; but if in virtue of the orders of his superior officials he exceeds the authority given him by law, he becomes at once responsible for the wrong done, and cannot plead in his defence strict obedience to official orders, and, further, for the tort he has committed he becomes amenable to the ordinary courts. In France, on the other hand, whilst the powers placed in the hands of the administration might be diminished, it is always assumed that the relation of individual citizens to the State is regu-

<sup>1</sup> See Aucoc, *Conférences sur l'Administration et sur le Droit administratif* (3rd ed., 1885), Intro., N° 6, p. 15; Hauriou, *Précis de Droit administratif* (3rd ed., 1897), p. 242; (10th ed., 1921), p. 10; Laferrière, *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. prélim., ch. i, pp. 1-8.

<sup>2</sup> See p. 489, *post*.

Part II. lated by principles different from those which govern the relation of one French citizen to another. *Droit administratif*, in short, rests upon ideas absolutely foreign to English law: the one, as I have already explained,<sup>1</sup> is that the relation of individuals to the State is governed by principles essentially different from those rules of private law which govern the rights of private persons towards their neighbours; the other is that questions as to the application of these principles do not lie within the jurisdiction of the ordinary courts. This essential difference renders the identification of *droit administratif* with any branch of English law an impossibility. Hence inquiries which rightly occupy French jurists, such, for example, as what is the proper definition of the *contentieux administratif*; what is the precise difference between *actes de gestion* and *actes de puissance publique*, and generally, what are the boundaries between the jurisdiction of the ordinary courts (*tribunaux judiciaires*) and the jurisdiction of the administrative courts (*tribunaux administratifs*) have under English law no meaning.

2nd Point.  
*Droit administratif*  
not in  
reality  
introduced  
into law of  
England.

Has *droit administratif* been of recent years introduced in any sense into the law of England?

This is an inquiry which has been raised by writers of eminence,<sup>2</sup> and which has caused some

<sup>1</sup> See p. 336, *ante*.

<sup>2</sup> See Laferrière, *Traité de la Juridiction administrative et des recours contentieux* (2nd ed., 1898), vol. i, bk. prélim., ch. iv, pp. 97-106. To cite such enactments as the Public Authorities Protection Act, 1893, which did little more than generalise provisions to be found in many Acts extending from 1601 to 1900, as an example of the existence of administrative law in England, seemed to the author little more than playing with words. The Act assumes that every person may legally do the act which by law he is ordered to do. It also gives a person who acts in pursuance of his legal duty, e.g. under an Act of Parliament,

perplexity. We may give thereto a decided and negative reply.<sup>1</sup>

The powers of the English Government have, during the last sixty years or so, been largely increased; the State has undertaken many new functions, such, for example, as the regulation of labour under the Factory Acts, and the supervision of public education under the Education Acts. Nor is the importance of this extension of the activity of the State lessened by the consideration that its powers are in many cases exercised by local bodies, such, for example, as County Councils. But though the powers conferred on persons or bodies who directly or indirectly represent the State have been greatly increased in many directions, there has been no intentional introduction into the law of England of the essential principles of *droit administratif*. Any official who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act; he is amenable to the authority of the ordinary courts, and the ordinary courts have themselves jurisdiction to determine what is the extent of his legal power, and whether the orders under which he has acted were legal and valid. Hence the courts do in effect limit and interfere with the action of the "administration," using that word in its widest sense.

special privileges as to the time within which an action must be brought against him for any wrong committed by him in the course of carrying out his duty, but it does not to the least extent provide that an order from a superior official shall protect, e.g. a policeman, for any wrong done by him. There are instances in which no legal remedy can be obtained except against the actual wrong-doer for damage inflicted by the conduct of a servant of the Crown. These instances the author regarded as practically unimportant. See App. sec. i (6).

<sup>1</sup> Cf. Intro. pp. lxxvi *et seq.*; App. sec. i (1) and (2).



Part II. The London School Board, for example, has claimed and exercised the right to tax the ratepayers for the support of a kind of education superior to the elementary teaching generally provided by School Boards; the High Court of Justice has decided that such right does not exist. A year or two ago some officials, acting under the distinct orders of the Lords of the Admiralty, occupied some land alleged to belong to the Crown; the title of the Crown being disputed, a court of law gave judgment against the officials as wrong-doers. In each of these cases nice and disputable points of law were raised, but no English lawyer, whatever his opinion of the judgments given by the court, has ever doubted that the High Court had jurisdiction to determine what were the rights of the School Board or of the Crown.

*Droit administratif*, therefore, has obtained no foothold in England, but, as has been pointed out by some foreign critics, recent legislation has occasionally, and for particular purposes, given to officials something like judicial authority. It is possible in such instances, which are rare, to see a slight approximation to *droit administratif*, but the innovations, such as they are, have been suggested merely by considerations of practical convenience, and do not betray the least intention on the part of English statesmen to modify the essential principles of English law. There exists in England no true *droit administratif*.

An English lawyer, however, who has ascertained that no branch of English law corresponds with the administrative law of foreign countries must be on his guard against falling into the error that the *droit*

*administratif* of modern France is not "law" at all, in the sense in which that term is used in England, but is a mere name for maxims which guide the executive in the exercise if not of arbitrary yet of discretionary power. That this notion is erroneous will, I hope, be now clear to all my readers. But for its existence there is some excuse and even a certain amount of justification.

The French Government does in fact exercise, especially as regards foreigners, a wide discretionary authority which is not under the control of any court whatever. For an act of State the Executive or its servants cannot be made amenable to the jurisdiction of any tribunal, whether judicial or administrative. Writers of high authority have differed<sup>1</sup> indeed profoundly as to the definition of an act of State (*acte de gouvernement*).<sup>2</sup> Where on a question of French law French jurists disagree, an English lawyer can form no opinion; he may be allowed, however, to conjecture that at times of disturbance a French Government can exercise discretionary powers without the dread of interference on the part of the ordinary courts, and that administrative tribunals, when they can intervene, are likely to favour that interpretation of the term act of State which supports the authority of the Executive. However this may be, the possession by the French Executive of large prerogatives is apt, in the mind of

<sup>1</sup> See p. 346, *ante*.

<sup>2</sup> Compare Laferrière, *op. cit.* (2nd ed., 1896), vol. ii, bk. iv, ch. ii, p. 32, and Hauriou, *Précis de Droit administratif* (3rd ed., 1897), pp. 282-287, (10th ed., 1921), pp. 431-436, with Jacquelin, *Les principes dominants du Contentieux administratif* (1899), part ii, tit. ii, ch. iii, pp. 297-326.

Part II. an Englishman, to be confused with the character of the administrative law enforced by courts composed, in part at any rate, of officials.

The restrictions, again, placed by French law on the jurisdiction of the ordinary courts (*tribunaux judiciaires*) whereby they are prevented from interfering with the action of the Executive and its servants, seem to an Englishman accustomed to a system under which the courts of law determine the limits of their own jurisdiction, to be much the same thing as the relegating of all matters in which the authority of the State is concerned to the discretion of the Executive. This notion is erroneous, but it has been fostered by a circumstance which may be termed accidental. The nature and the very existence of *droit administratif* has been first revealed to many Englishmen, as certainly to the present writer, through the writings of Alexis de Tocqueville, whose works have exerted, in the England of the nineteenth century, an influence equal to the authority exerted by the works of Montesquieu in the England of the eighteenth century. Now de Tocqueville by his own admission knew little or nothing of the actual working of *droit administratif* in his own day.<sup>1</sup> He no doubt in his later years increased his knowledge, but to the end of his life he looked upon *droit administratif*, not as a practising lawyer but as the historian of the *ancien régime*, and even as an historian he studied the subject from a very peculiar point of view, for the aim of *L'Ancien Régime et la Révolution* is to establish the doctrine that the institutions of modern France are in many respects

<sup>1</sup> de Tocqueville, *Œuvres complètes* (14th ed., 1864), vol. vii (Correspondance), p. 66.

in spirit the same as the institutions of the ancient monarchy ; and de Tocqueville, moved by the desire to maintain a theory of history which in his time sounded like a paradox, but, owing greatly to his labours, has now become a generally accepted truth, was inclined to exaggerate the similarity between the France of the Revolution, the Empire, or the Republic, and the France of the *ancien régime*. Nowhere is this tendency more obvious than in his treatment of *droit administratif*. He demonstrates that the ideas on which *droit administratif* is based had been accepted by French lawyers and statesmen long before 1789 ; he notes the arbitrariness of *droit administratif* under the monarchy ; he not only insists upon but deplores the connection under the *ancien régime* between the action of the Executive and the administration of justice, and he certainly suggests that the *droit administratif* of the nineteenth century was all but as closely connected with the exercise of arbitrary power as was the *droit administratif* of the seventeenth or the eighteenth century.

He did not recognise the change in the character of *droit administratif* which was quietly taking place in his own day. He could not by any possibility anticipate the reforms which have occurred during the lapse of well-nigh half a century since his death. What wonder that English lawyers who first gained their knowledge of French institutions from de Tocqueville should fail to take full account of that judicialisation (*juridictionnalisation*) of administrative law which is one of the most surprising and noteworthy phenomena in the legal history of France.

## Part II.

III. Merits  
and  
demerits.Rule of  
law—its  
merits.

It is not uninstructional to compare the merits and defects, on the one hand, of our English rule of law, and, on the other, of French *droit administratif*.<sup>1</sup>

Our rigid rule of law has immense and undeniable merits. Individual freedom is thereby more thoroughly protected in England against oppression by the government than in any other European country; the Habeas Corpus Acts<sup>2</sup> protect the liberty no less of foreigners than of British subjects; martial law<sup>3</sup> itself is reduced within the narrowest limits, and subjected to the supervision of the courts; an extension of judicial power which sets at naught the dogma of the separation of powers, happily combined with judicial independence, has begotten reverence for the bench of judges. They, rather than the government, represent the august dignity of the State, or, in accordance with the terminology of English law, of the Crown. Trial by jury is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting difficult problems of fact to the decision of twelve men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of, popular confidence in the judicial bench. A judge is the colleague and the readily accepted guide of the jurors. The House of Commons shows the feeling of the electors, and has handed over to the High Court of Justice the

<sup>1</sup> See especially Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 210 *et seq.*

<sup>2</sup> See p. 216, *ante*.

<sup>3</sup> See p. 284, *ante*.



trial of election petitions. When rare occasions arise, as at Sheffield in 1866, which demand inquiries of an exceptional character which can hardly be effected by the regular procedure of the courts, it is to selected members of the bench that the nation turns for aid. In the bitter disputes which occur in the conflicts between capital and labour, employers and workmen alike will often submit their differences to the arbitration of men who have been judges of the High Court. Reverence, in short, for the supremacy of the law is seen in its very best aspect when we recognise it as being in England at once the cause and the effect of reverence for our judges.

The blessings, however, conferred upon the nation by the rule of law are balanced by undeniable, though less obvious, evils. Courts cannot without considerable danger be turned into instruments of government. It is not the end for which they are created; it is a purpose for which they are ill suited at any period or in any country where history has not produced veneration for the law and for the law courts.<sup>1</sup> Respect for law, moreover, easily degenerates into legalism which from its very rigidity may work considerable injury to the nation. Thus the refusal to look upon an agent or servant of the State as standing, from a legal point of view, in a different position from the servant of any other employer, or as placed under obligations or entitled to immunities different from those imposed upon or granted to an ordinary citizen, has certainly saved England from the development of

<sup>1</sup> In times of revolutionary passion trial by jury cannot secure respect for justice. The worst iniquities committed by Jeffreys at the Bloody Assize would have been impossible, had he not found willing accomplices in the jurors and freeholders of the western counties.

Part II. the arbitrary prerogatives of the Crown, but it has also in more ways than one been injurious to the public service.

The law, for instance, has assuredly been slow to recognise the fact that violations of duty by public officials may have an importance and deserve a punishment far greater than the same conduct on the part of an agent of an ordinary employer. Some years ago a copyist in a public office betrayed to the newspapers a diplomatic document of the highest importance. Imagination can hardly picture a more flagrant breach of duty, but there then apparently existed no available means for punishing the culprit. If it could have been proved that he had taken from the office the paper on which the communication of state was written, he might conceivably have been put on trial for larceny.<sup>1</sup> But a prisoner put on trial for a crime of which he was in fact morally innocent, because the gross moral offence of which he was really guilty was not a crime, might have counted on an acquittal. The Official Secrets Act, 1889,<sup>2</sup> now, it is true, renders the particular offence, which could not be punished in 1878, a misdemeanour, but the Act, after the manner of English legislation, does not establish the general principle that an official breach of trust is a crime. It is therefore more than possible that derelictions of duty on the part of public servants which in some foreign countries would be severely punished may still in England expose the wrong-doer to no legal punishment.

<sup>1</sup> See *Annual Register*, 1878, *Chronicle*, pp. 71, 72.

<sup>2</sup> See now Official Secrets Acts, 1911 and 1920. See especially s. 2 of the former Act and App. sec. ii (B), pp. 581, 582.

Nor is it at all wholly a benefit to the public that *bona fide* obedience to the orders of superiors is not a defence available to a subordinate who, in the discharge of his functions as a government officer, has invaded the legal rights of the humblest individual, or that officials are, like everybody else, accountable for their conduct to an ordinary court of law, and to a court, be it noted, where the verdict is given by a jury.

In this point of view few things are more instructive than an examination of the actions which have been brought against officers of the Board of Trade for detaining ships about to proceed to sea. Under the Merchant Shipping Acts since 1876 the Board have been and are bound to detain any ship which from its unsafe and unseaworthy condition cannot proceed to sea without serious danger to human life.<sup>1</sup> Most persons would suppose that the officials of the Board, as long as they, *bona fide*, and without malice or corrupt motive, endeavoured to carry out the provisions of the statute, would be safe from an action at the hands of a shipowner. This, however, is not so. The Board and its officers have more than once been sued with success.<sup>2</sup> They have never been accused of either malice or negligence, but the mere fact that the Board act in an administrative capacity is not a protection to the Board, nor is mere obedience to the orders of the Board an answer to an action against its servants. Any deviation, moreover, from the exact terms of the Acts—the omission of the most unmeaning formality—may make every person, high

<sup>1</sup> Merchant Shipping Act, 1894, s. 459.

<sup>2</sup> See *ibid.*, s. 460, and *Thompson v. Farrer* (1882) 9 Q.B.D. 372; cf. *Marshall Shipping Co. v. Board of Trade* [1923] 2 K.B. 343.

Part II. and low, concerned in the detention of the ship, a wrong-doer. The question, on the answer to which the decision in each instance at bottom depends, is whether there was reasonable cause for detaining the vessel, and this inquiry is determined by jurymen who sympathise more keenly with the losses of a ship-owner, whose ship may have been unjustly detained, than with the zeal of an inspector anxious to perform his duty and to prevent loss of life. The result has (it is said) been to render the provisions of the Merchant Shipping Acts, with regard to the detention of unseaworthy ships, nugatory. Juries are often biassed against the Government. A technical question is referred for decision, from persons who know something about the subject, and are impartial, to persons who are both ignorant and prejudiced. The government, moreover, which has no concern but the public interest, is placed in the false position of a litigant fighting for his own advantage. These things ought to be noticed, for they explain, if they do not justify, the tenacity with which statesmen, as partial as de Tocqueville to English ideas of government, have clung to the conviction that administrative questions ought to be referred to administrative courts.

*Droit  
adminis-  
tratif—  
merits.*

The merits of administrative law as represented by modern French *droit administratif*, that is, when seen at its very best, escape the attention, and do not receive the due appreciation of English constitutionalists.<sup>1</sup> No jurist can fail to admire the skill with which the *Conseil d'Etat*, the authority and the jurisdiction whereof as an administrative court year by year receives extension, has worked out new

<sup>1</sup> One, and not the least of them, is that access to the *Conseil d'Etat* as an administrative court is both easy and inexpensive.

remedies for various abuses which would appear to be hardly touched by the ordinary law of the land. The *Conseil*, for instance, has created and extended the power of almost any individual to attack, and cause to be annulled, any act done by any administrative authority (using the term in a very wide sense) which is in excess of the legal power given to the person or body from whom the act emanates. Thus an order issued by a prefect or a by-law made by a corporation which is in excess of the legal power of the prefect or of the corporate body may, on the application of a plaintiff who has any interest in the matter whatever, be absolutely set aside or annulled for the benefit not only of the plaintiff, but of all the world, and this even though he has not himself suffered, from the act complained of, any pecuniary loss or damage. The ingenious distinction<sup>1</sup> again, which has been more and

<sup>1</sup> French law draws an important distinction between an injury caused to a private individual by act of the administration or government which is in excess of its powers (*faute de service*), though duly carried out, or at any rate, carried out without any gross fault on the part of a subordinate functionary, e.g. a policeman acting in pursuance of official orders, and injury caused to a private individual by the negligent or malicious manner (*faute personnelle*) in which such subordinate functionary carries out official orders which may be perfectly lawful. In the first case the policeman incurs no liability at all, and the party aggrieved must proceed in some form or other against the State in the *tribunaux administratifs*; in the second case the policeman is personally liable, and the party aggrieved must proceed against him in the *tribunaux civils* (see Hauriou, *Précis de Droit administratif* (3rd ed., 1897), pp. 170, 171; (10th ed., 1921), pp. 366-380; Laferrière, *Traité de la Jurisdiction administrative et des recours contentieux* (2nd ed., 1896), vol. i, bk. iii, ch. vii, p. 652), and apparently cannot proceed against the State.

French authorities differ as to what is the precise criterion by which to distinguish a *faute personnelle* from a *faute de service*, and show a tendency to hold that there is no *faute personnelle* on the part, e.g., of a policeman, when he has *bona fide* attempted to carry out his official duty. See Duguit, *L'Etat, les gouvernants et les agents* (1903), ch. v, para. 11, pp. 638-640; *Traité de Droit constitutionnel* (2nd ed., vol. iii, 1923), ch. iv, para. 72, pp. 262-295; cf. App. sec. i (4), p. 500.



Part II. more carefully elaborated by the *Conseil d'Etat*, between damage resulting from the personal fault (*faute personnelle*), e.g. spite, violence, or negligence of an official, e.g. a prefect or a mayor, in the carrying out of official orders, and the damage resulting, without any fault on the part of the official, from the carrying out of official orders, illegal or wrongful in themselves (*faute de service*), has of recent years afforded a valuable remedy to persons who have suffered from the misuse of official power, and has also, from one point of view, extended or secured the responsibility of officials—a responsibility enforceable in the ordinary courts—for wrongful conduct, which is in strictness attributable to their personal action. And in no respect does this judge-made law of the *Conseil* appear to more advantage than in cases, mostly I conceive of comparatively recent date, in which individuals have obtained compensation for governmental action, which might possibly be considered of technical legality, but which involves in reality the illegitimate use of power conferred upon the government or some governmental body for one object, but in truth used for some end different from that contemplated by the law. One example explains my meaning. The State in 1872 had, as it still has, a monopoly of matches. To the government was given by law the power of acquiring existing match factories under some form of compulsory purchase. It occurred to some ingenious minister that the fewer factories there were left open for sale, the less would be the purchase-money which the State would need to pay. A prefect, the direct servant of the government, had power to close factories on sanitary grounds.

Under the orders of the minister he closed a factory belonging to *A*, nominally on sanitary grounds, but in reality to lessen the number of match factories which the State, in the maintenance of its monopoly, would require to purchase. There was no personal fault on the part of the prefect. No action could with success be maintained against him in the judicial courts,<sup>1</sup> nor, we may add, in the administrative courts.<sup>2</sup> *A*, however, attacked the act itself before the *Conseil d'Etat*, and got the order of the prefect annulled,<sup>2</sup> and ultimately obtained, through the *Conseil d'Etat*, damages from the State of over £2000 for the illegal closing of the factory, and this in addition to the purchase-money received from the State for taking possession of the factory.<sup>3</sup>

No Englishman can wonder that the jurisdiction of the *Conseil d'Etat*, as the greatest of administrative courts, grows apace; the extension of its power removes, as did at one time the growth of Equity in England, real grievances, and meets the need of the ordinary citizen. Yet to an Englishman imbued with an unshakeable faith in the importance of maintaining the supremacy of the ordinary law of the land enforced by the ordinary law courts, the *droit administratif* of modern France is open to some grave criticism. Defects.

The high and increasing authority of the *Conseil d'Etat* must detract, he surmises, from the dignity and respect of the judicial courts. "The more there is of the more, the less there is of the less" is a Spanish proverb of profound wisdom and wide appli-

<sup>1</sup> Dalloz, *Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine*, Cass. Crim., 6 Mars, 1875; D. 1875.1.495.

<sup>2</sup> Dalloz, *op. cit.*, Trib. de Conflits, 5 Mai, 1877; D. 1878.3.13.

<sup>3</sup> Dalloz, *op. cit.*, *Conseil d'Etat*, 4 Décembre, 1879; D. 1880.3.41.

Part II. cation. There was a time in the history of England when the judicial power of the Chancellor, bound up as it was with the prerogative of the Crown, might have overshadowed the courts of law, which have protected the hereditary liberties of England and the personal freedom of Englishmen. It is difficult not to suppose that the extension of the *Conseil's* jurisdiction, beneficial as may be its direct effects, may depress the authority of the judicial tribunals. More than one writer, who ought to represent the ideas of educated Frenchmen, makes the suggestion that if the members of the *Conseil d'Etat* lack that absolute security of tenure which is universally acknowledged to be the best guarantee of judicial independence, yet irremovable judges, who, though they may defy dismissal, are tormented by the constant longing for advancement,<sup>1</sup> are not more independent of the Government at whose hands they expect promotion than are members of the *Conseil d'Etat* who, if legally removable, are by force of custom hardly ever removed from their high position.

Trial by jury, we are told, is a joke, and, as far as the interests of the public are concerned, a very bad joke.<sup>2</sup> Prosecutors and criminals alike prefer the *Tribunaux Correctionnels*, where a jury is unknown, to the *Cours d'Assises*, where a judge presides and a jury gives a verdict. The prosecutor knows that in the *Tribunaux Correctionnels* proved guilt will lead to condemnation. The criminal knows that though in the inferior court he may lose the chance of acquittal by good-natured or sentimental jurymen, he also

<sup>1</sup> See Chardon, *L'Administration de la France—Les fonctionnaires* (1908), pp. 326-328.

<sup>2</sup> *Ibid.*

avoids the possibility of undergoing severe punishment. Two facts are certain. In 1881 the judges were deprived of the right of charging the jury. Year by year the number of causes tried in the *Cours d'Assises* decreases. Add to this that the procedure of the judicial courts, whether civil or criminal, is antiquated and cumbrous. The procedure in the great administrative court is modelled on modern ideas, is simple, cheap, and effective. The *Cour de Cassation* still commands respect. The other judicial courts, one can hardly doubt, have sunk in popular estimation. Their members neither exercise the power nor enjoy the moral authority of the judges of the High Court.

It is difficult, further, for an Englishman to believe that, at any rate where politics are concerned, the administrative courts can from their very nature give that amount of protection to individual freedom which is secured to every English citizen, and indeed to every foreigner residing in England. However this may be, it is certain that the distinction between ordinary law and administrative law (taken together with the doctrine of the separation of powers, at any rate as hitherto interpreted by French jurists), implies the general belief that the agents of the government need, when acting in *bona fide* discharge of their official duties, protection from the control of the ordinary law courts. That this is so is proved by more than one fact. The desire to protect servants of the State has dictated the enactment of the *Code Pénal*, Article 114. This desire kept alive for seventy years Article 75 of the Constitution of the Year VIII. It influenced even the men by whom that Article was repealed, for the repeal itself is expressed

Part II. in words which imply the intention of providing some special protection for the agents of the government. It influenced the decisions which more or less nullified the effect of the law of 19th December, 1870, which was at first supposed to make the judicial courts the sole judges of the liability of civil servants to suffer punishment or make compensation for acts of dubious legality done in the performance of their official duties. Oddly enough, the success with which administrative courts have extended the right of private persons to obtain damages from the State itself for illegal or injurious acts done by its servants, seems, as an English critic must think, to supply a new form of protection for the agents of the government when acting in obedience to orders. There surely can be little inducement to take proceedings against a subordinate, whose guilt consists merely in carrying out a wrongful or illegal order, given him by his official superior, if the person damaged can obtain compensation from the government, or, in other words, from the State itself.<sup>1</sup> But turn the matter which way you will, the personal immunities of officials who take part, though without other fault of their own, in any breach of the law, though consistent even with the modern *droit administratif* of France, are inconsistent with the ideas which

<sup>1</sup> Compare the extended protection offered to every servant of the State by the doctrine, suggested by at least one good authority, that he cannot be held personally responsible for any wrong (*faute*) committed whilst he is acting in the spirit of his official duty. "Si, en effet, le *fonctionnaire a agi dans l'esprit de sa fonction, c'est-à-dire en poursuivant effectivement le but qu'avait l'Etat en établissant cette fonction, il ne peut être responsable ni vis-à-vis de l'Etat, ni vis-à-vis des particuliers, alors même qu'il ait commis une faute.*"—Duguit, *L'Etat, les gouvernants et les agents* (1903), ch. v, para. 11. p. 638.



underlie the common law of England. This essential opposition has been admirably expressed by a French jurist of eminence.

"Under every legal system," writes Hauriou, "the right to proceed against a servant of the government for wrongs done to individuals in his official capacity exists in some form or other; the right corresponds to the instinctive impulse felt by every victim of a legal wrong to seek compensation from the immediately visible wrong-doer. But on this point the laws of different countries obey utterly different tendencies. There are countries [such, for example, as England or the United States] where every effort is made to shelter the liability of the State behind the personal responsibility of its servant. There are other countries where every effort is made to cover the responsibility of the servant of the State behind the liability of the State itself, to protect him against, and to save him from, the painful consequences of faults committed in the service of the State. The laws of centralised countries, and notably the law of France, are of this type. There you will find what is called the protection of officials" (*garantie des fonctionnaires*).<sup>1</sup>

<sup>1</sup> "Ce principe est admis par toutes les législations, la poursuite du fonctionnaire existe partout, d'autant qu'elle répond à un mouvement instinctif qui est, pour la victime d'un méfait, de s'en prendre à l'auteur immédiatement visible. Mais les législations obéissent à deux tendances bien opposées : il en est qui s'efforcent d'abriter l'Etat derrière le fonctionnaire, il en est d'autres, au contraire, qui s'efforcent de faire couvrir le fonctionnaire par l'Etat, de le protéger, de le rassurer contre les conséquences fâcheuses de ses erreurs. Les législations des pays centralisés et notamment celle de la France sont de ce dernier type ; il y a ce que l'on appelle une garantie des fonctionnaires."—Hauriou, *Précis de Droit administratif* (3rd ed., 1897), pp. 170, 171 ; (10th ed., 1921), pp. 366-380.

## CHAPTER XIII

### RELATION BETWEEN PARLIAMENTARY SOVEREIGNTY AND THE RULE OF LAW

**Part II.** THE sovereignty of Parliament and the supremacy of the law of the land—the two principles which pervade the whole of the English constitution—may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority, of Parliamentary sovereignty.

Parlia-  
mentary  
sovereignty  
favours  
rule of law.

The sovereignty of Parliament favours the supremacy of the law of the land.<sup>1</sup>

That this should be so arises in the main from two

<sup>1</sup> Compare *The Law and the Constitution* (2nd ed., 1938), pp. 56 *et seq.* Jennings suggests that legislation need not be deliberate, *e.g.* Defence of the Realm Acts. The provisions of the Parliament Act, 1911, as to Money Bills, reduce the function of the House of Lords to that of a rubber stamp. See too the Provisional Collection of Taxes Act, 1913. The difficulty in accepting Dicey's argument lies in the fact that parliamentary supremacy is a legal rule. How then can the law limit it? Cases where it does appear to be limited are governed by convention, not law recognised by courts, *e.g.* s. 4 of Statute of Westminster, 1931. See Intro. pp. xlviii *et seq.*, *ante.*—ED.

characteristics or peculiarities which distinguish the English Parliament from other sovereign powers.

The first of these characteristics is that the commands of Parliament (consisting as it does of the Crown, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts, and must, therefore always take the shape of formal and deliberate legislation. The will of Parliament<sup>1</sup> can be expressed only through an Act of Parliament.

This is no mere matter of form; it has most important practical effects. It prevents those inroads upon the law of the land which a despotic monarch, such as Louis XIV., Napoleon I., or Napoleon III., might effect by ordinances or decrees, or which the different constituent assemblies of France, and above all the famous Convention, carried out by sudden resolutions. The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of the judges. A Bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which

<sup>1</sup> In the author's opinion a strong, if not the strongest, argument in favour of the so-called "bi-cameral" system, was to be found in the consideration that the co-existence of two legislative chambers prevented the confusion of resolutions passed by either House with laws, and thus checked the substitution of the arbitrary will of an assembly for the supremacy of the ordinary law of the land. To appreciate the force of this argument the history, not only of the French Convention but also of the English Long Parliament, had to be considered.

Part II. officially he has no cognisance), or even of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent. All this, which seems natural enough to an English lawyer, would greatly surprise many foreign legists, and no doubt often does give a certain narrowness to the judicial construction of statutes. It contributes greatly, however, both (as I have already pointed out) to the authority of the judges and to the fixity of the law.<sup>1</sup>

The second of these characteristics is that the English Parliament as such has never, except at periods of revolution, exercised direct executive power or appointed the officials of the executive government.<sup>2</sup>

No doubt in modern times the House of Commons has in substance obtained the right to designate for appointment the Prime Minister and the other members of the Cabinet. But this right is, historically speaking, of recent acquisition, and is exercised in a very roundabout manner; its existence does not affect the truth of the assertion that the Houses of Parlia-

<sup>1</sup> The principle that the sovereign legislature can express its commands only in the particular form of an Act of Parliament originates in historical causes; it is due to the fact that an Act of Parliament was once in reality, as it still is in form, a law enacted by the King by and with the advice and consent of the Lords and Commons in Parliament assembled.

<sup>2</sup> But it may be questioned whether any legislature could conduct administration. The feature of British parliamentary democracy is that the legislature is guided by the same Ministers as are controlling the administration. This does not depend upon the rule of law, but it produces the result that Ministers can be reasonably sure of Parliament enacting any changes in the law which they propose, while at the same time Ministers answer for the acts of themselves and the officials of their Departments. It is the electorate which forces a change of Ministers by its verdict at the polls.—Ed.

ment do not directly appoint or dismiss the servants of the State; neither the House of Lords nor the House of Commons, nor both Houses combined, could even now issue a direct order to a military officer, a constable, or a tax-collector; the servants of the State are still in name what they once were in reality—"servants of the Crown"; and, what is worth careful notice, the attitude of Parliament towards government officials was determined originally, and is still regulated, by considerations and feelings belonging to a time when the "servants of the Crown" were dependent upon the King, that is, upon a power which naturally excited the jealousy and vigilance of Parliament.

Hence several results all indirectly tending to support the supremacy of the law. Parliament, though sovereign, unlike a sovereign monarch who is not only a legislator but a ruler, that is, head of the executive government, has never hitherto been able to use the powers of the government as a means of interfering with the regular course of law;<sup>1</sup> and what is even more important, Parliament has looked with disfavour and jealousy on all exemptions of officials from the ordinary liabilities of citizens or from the jurisdiction of the ordinary courts; Parliamentary sovereignty has been fatal to the growth of "administrative law."<sup>2</sup> The action, lastly, of Parliament has tended as naturally to protect the independence

<sup>1</sup> Contrast with this the way in which, even towards the end of the eighteenth century, French Kings interfered with the action of the courts.

<sup>2</sup> Administrative law is now recognised as the creation of Parliament. The inverted commas show that the author is referring here, as always, to his own conception of *droit administratif* as applied to conditions in England.—ED.



Part II. of the judges, as that of other sovereigns to protect the conduct of officials. It is worth notice that Parliamentary care for judicial independence has, in fact, stopped just at that point where on *a priori* grounds it might be expected to end. The judges are not in strictness irremovable; they can be removed from office on an address of the two Houses; they have been made by Parliament independent of every power in the State except the Houses of Parliament.

Tendency  
to support  
rule of law  
often not  
found in  
foreign  
representative  
assemblies.

The idea may suggest itself to a reader that the characteristics or peculiarities of the English Parliament on which I have just dwelt must now be common to most of the representative assemblies which exist in continental Europe. The French Parliament (Chamber and Senate) bears a considerable external resemblance to our own Parliament. It is influenced, however, by a different spirit; it is the heir, in more ways than one, of the Bourbon Monarchy and the Napoleonic Empire. It is apparently, though on this point a foreigner must speak with hesitation, inclined to interfere in the details of administration. It does not look with special favour on the independence or authority of the ordinary judges. It shows no disapprobation of the system of *droit administratif* which Frenchmen—very likely with truth—regard as an institution suited to their country, and it certainly leaves in the hands of the government wider executive and even legislative powers than the English Parliament has ever conceded either to the Crown or to its servants. What is true of France is true under a different form of many other continental states, such, for example, as Switzerland

or Prussia. The sovereignty of Parliament as developed in England supports the supremacy of the law. But this is certainly not true of all the countries which enjoy representative or Parliamentary government.

Chapter  
XIII.

The supremacy of the law necessitates the exercise of Parliamentary sovereignty.

Rule of law  
favours  
Parlia-  
mentary  
sove-  
reignty.

The rigidity of the law constantly hampers (and sometimes with great injury to the public) the action of the executive, and from the hard-and-fast rules of strict law, as interpreted by the judges, the government can escape only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land. Note with care the way in which the necessity for discretionary powers brings about the recourse to exceptional legislation. Under the complex conditions of modern life no government can in times of disorder, or of war, keep the peace at home, or perform its duties towards foreign powers, without occasional use of arbitrary authority. During periods, for instance, of social disturbance you need not only to punish conspirators, but also to arrest men who are reasonably suspected of conspiracy; foreign revolutionists are known to be spreading sedition throughout the land; order can hardly be maintained unless the executive can expel aliens. When two foreign nations are at war, or when civil contests divide a friendly country into two hostile camps, it is impossible for England to perform her duties as a neutral unless the Crown has legal authority to put a summary check to the attempts of English sympathisers to help one or other of the belligerents. Foreign nations, again, feel aggrieved if

**Part II.** they are prevented from punishing theft and homicide, —if, in short, their whole criminal law is weakened because every scoundrel can ensure impunity for his crimes by an escape to England. But this result must inevitably ensue if the English executive has no authority to surrender French or German offenders to the government of France or of Germany. The English executive needs therefore the right to exercise discretionary powers, but the Courts must prevent, and will prevent at any rate where personal liberty is concerned, the exercise by the government of any sort of discretionary power. The Crown cannot, except under statute, expel from England any alien<sup>1</sup> whatever, even though he were a murderer who, after slaughtering a whole family at Boulogne, had on the very day crossed red-handed to Dover. The executive therefore must ask for, and always obtains, aid from Parliament. An Aliens Act enables the Ministry to expel any foreigner from the country; a Foreign Enlistment Act makes it possible for the Ministry to check intervention in foreign contests or the supply of arms to foreign belligerents. Extradition Acts empower the government at the same time to prevent England from becoming a city of refuge for foreign criminals, and to co-operate with foreign states in that general repression of crime in which the whole civilised world has an interest. Nor have we yet exhausted the instances in which the rigidity of the law necessitates the intervention of Parliament. There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which

<sup>1</sup> See, however, p. 225, note 1, *ante*.

the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity. A statute of this kind is (as already pointed out<sup>1</sup>) the last and supreme exercise of Parliamentary sovereignty. It legalises illegality; it affords the practical solution of the problem which perplexed the statesmanship of the sixteenth and seventeenth centuries, how to combine the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must at critical junctures be wielded by the executive government of every civilised country.

This solution may be thought by some critics a merely formal one, or at best only a substitution of the despotism of Parliament for the prerogative of the Crown. But this idea is erroneous. The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to

<sup>1</sup> See pp. 49, 50, 232-237, *ante*.

**Part II.** construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments. In foreign countries, and especially in France, administrative ideas— notions derived from the traditions of a despotic monarchy—have restricted the authority and to a certain extent influenced the ideas of the judges. In England judicial notions have modified the action and influenced the ideas of the executive government. By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.



## PART III

### THE CONNECTION BETWEEN THE LAW OF THE CONSTITUTION AND THE CONVENTIONS OF THE CONSTITUTION

10

## CHAPTER XIV

### NATURE OF CONVENTIONS OF CONSTITUTION

IN an earlier part of this work<sup>1</sup> stress was laid upon the essential distinction between the "law of the constitution," which, consisting (as it does) of rules enforced or recognised by the courts, makes up a body of "laws" in the proper sense of that term, and the "conventions of the constitution," which consisting (as they do) of customs, practices, maxims, or precepts which are not enforced or recognised by the courts, make up a body not of laws, but of constitutional or political ethics; and it was further urged that the law, not the morality of the constitution, forms the proper subject of legal study.<sup>2</sup> In accordance with this view, the reader's attention has been hitherto exclusively directed to the meaning and applications of two principles which pervade the law of the constitution, namely, the Sovereignty of Parliament<sup>3</sup> and the Rule of Law.<sup>4</sup>

Chapter  
XIV.

Questions  
remaining  
to be  
answered.

But a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of

<sup>1</sup> See pp. 23-30, *ante*.

<sup>2</sup> See pp. 30-32, *ante*.

<sup>3</sup> See Part i.

<sup>4</sup> See Part ii.

**Part III.** historians or of statesmen. He ought to ascertain, at any rate, how, if at all, the law of the constitution is connected with the conventions of the constitution; and a lawyer who undertakes this task will soon find that in so doing he is only following one stage farther the path on which we have already entered, and is on the road to discover the last and most striking instance of that supremacy of the law which gives to the English polity the whole of its peculiar colour.

My aim therefore throughout the remainder of this book is to define, or ascertain, the relation or connection between the legal and the conventional elements in the constitution, and to point out the way in which a just appreciation of this connection throws light upon several subordinate questions or problems of constitutional law.

This end will be attained if an answer is found to each of two questions: What is the nature of the conventions or understandings of the constitution? What is the force or (in the language of jurisprudence) the "sanction" by which is enforced obedience to the conventions of the constitution? These answers will themselves throw light on the subordinate matters to which I have made reference.

Nature of  
constitu-  
tional  
under-  
standings.

The salient characteristics, the outward aspects so to speak, of the understandings which make up the constitutional morality of modern England, can hardly be better described than in the words of Mr. Freeman:—

"We now have a whole system of political  
"morality, a whole code of precepts for the guidance of  
"public men, which will not be found in any page  
"of either the statute or the common law, but which  
"are in practice held hardly less sacred than any

“principle embodied in the Great Charter or in the  
 “Petition of Right. In short, by the side of our  
 “written Law, there has grown up an unwritten or  
 “conventional constitution. When an Englishman  
 “speaks of the conduct of a public man being consti-  
 “tutional or unconstitutional, he means something  
 “wholly different from what he means by conduct  
 “being legal or illegal. A famous vote of the House  
 “of Commons, passed on the motion of a great states-  
 “man, once declared that the then Ministers of the  
 “Crown did not possess the confidence of the House  
 “of Commons, and that their continuance in office  
 “was therefore at variance with the spirit of the con-  
 “stitution. The truth of such a position, accord-  
 “ing to the traditional principles on which public men  
 “have acted for some generations, cannot be disputed ;  
 “but it would be in vain to seek for any trace of such  
 “doctrines in any page of our written Law. The  
 “proposer of that motion did not mean to charge the  
 “existing Ministry with any illegal act, with any act  
 “which could be made the subject either of a prose-  
 “cution in a lower court or of impeachment in the  
 “High Court of Parliament itself. He did not mean  
 “that they, Ministers of the Crown, appointed  
 “during the pleasure of the Crown, committed  
 “any breach of the Law of which the Law could  
 “take cognisance, by retaining possession of their  
 “offices till such time as the Crown should think  
 “good to dismiss them from those offices. What he  
 “meant was that the general course of their policy  
 “was one which to a majority of the House of Com-  
 “mons did not seem to be wise or beneficial to the  
 “nation, and that therefore, according to a conven-

**Part III.** "tional code as well understood and as effectual as  
 "the written Law itself, they were bound to resign  
 "offices of which the House of Commons no longer  
 "held them to be worthy."<sup>1</sup>

The one exception which can be taken to this picture of our conventional constitution is the contrast drawn in it between the "written law" and the "unwritten constitution"; the true opposition, as already pointed out, is between laws properly so called, whether written or unwritten, and understandings, or practices, which, though commonly observed, are not laws in any true sense of that word at all. But this inaccuracy is hardly more than verbal, and we may gladly accept Mr. Freeman's words as a starting-point whence to inquire into the nature or common quality of the maxims which make up our body of constitutional morality.

Examples  
 of consti-  
 tutional  
 under-  
 standings.

The following are examples<sup>2</sup> of the precepts to which Mr. Freeman refers, and belong to the code by which public life in England is (or is supposed to be) governed. "A Ministry which is outvoted in the House of Commons is in many cases bound to retire from office." "A Cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution." "If an appeal to the electors goes against the Ministry they are bound to retire from office, and have no right to dissolve Parliament a second time." "The Cabinet are responsible to Parliament as a body, for the general conduct of affairs." "They are further

<sup>1</sup> Freeman, *Growth of the English Constitution* (1st ed., 1872), pp. 109, 110.

<sup>2</sup> See, for further examples, p. 26, *ante*.



responsible to an extent, not however very definitely fixed, for the appointments made by any of their number, or to speak in more accurate language, made by the Crown under the advice of any member of the Cabinet." "The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office." "The most influential of these leaders ought (generally speaking) to be the Premier, or head of the Cabinet." These are precepts referring to the position and formation of the Cabinet. It is, however, easy to find constitutional maxims dealing with other topics. "Treaties can be made without the necessity for any Act of Parliament; but the Crown, or in reality the Ministry representing the Crown, ought not to make any treaty which will not command the approbation of Parliament." "The foreign policy of the country, the proclamation of war, and the making of peace ought to be left in the hands of the Crown, or in truth of the Crown's servants. But in foreign as in domestic affairs, the wish of the two Houses of Parliament or (when they differ) of the House of Commons ought to be followed." "The action of any Ministry would be highly unconstitutional if it should involve the proclamation of war, or the making of peace, in defiance of the wishes of the House." "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point, not definitely fixed, to give way, and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of

Part III. its responsible advisers, to create or to threaten to create enough new Peers to override the opposition of the House of Lords, and thus restore harmony between the two branches of the legislature."<sup>1</sup> "Parliament ought to be summoned for the despatch of business at least once in every year." "If a sudden emergency arise, *e.g.* through the outbreak of an insurrection, or an invasion by a foreign power, the Ministry ought, if they require additional authority, at once to have Parliament convened and obtain any powers which they may need for the protection of the country. Meanwhile Ministers ought to take every step, even at the peril of breaking the law, which is necessary either for restoring order or for repelling attack, and (if the law of the land is violated) must rely for protection on Parliament passing an Act of Indemnity."

Common  
character-  
istic of con-  
stitutional  
under-  
standings.

These rules (which I have purposely expressed in a lax and popular manner), and a lot more of the same kind, make up the constitutional morality of the day. They are all constantly acted upon, and, since they cannot be enforced by any court of law, have no claim to be considered laws. They are multifarious, differing, as it might at first sight appear, from each other not only in importance but in general character and scope. They will be found however, on careful examination, to possess one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown)

<sup>1</sup> See Parliament Act, 1911, and *cf.* Hearn, *Government of England* (2nd ed., 1887), p. 178.

ought to be exercised ;<sup>1</sup> and this characteristic will be found on examination to be the trait common not only to all the rules already enumerated, but to by far the greater part (though not quite to the whole) of the conventions of the constitution. This matter, however, requires for its proper understanding some further explanation.

The discretionary powers of the government mean every kind of action which can legally be taken by the Crown, or by its servants, without the necessity for applying to Parliament for new statutory authority. Thus no statute is required to enable the Crown to dissolve or to convoke Parliament, to make peace or war, to create new Peers, to dismiss a Minister from office or to appoint his successor. The doing of all these things lies legally at any rate within the discretion of the Crown ; they belong therefore to the 'discretionary authority of the government. This authority may no doubt originate in Parliamentary enactments, and, in a limited number of cases, actually does so originate.<sup>2</sup> Thus the British Nationality and Status of Aliens Act, 1914, gives to a Secretary of State the right under certain circumstances to convert an alien into a naturalised British subject ; and the Extradition Act, 1870, enables a

Constitutional conventions are mainly rules for governing exercise of prerogative.

<sup>1</sup> They go further and provide for the whole working of the complicated government machine. Nowadays the majority of Ministers are concerned with statutory functions ; the exceptions include, however, the Prime Minister, the Secretaries of State, and the First Lord of the Admiralty. But much of the work of the Home Secretary, the Secretary of State for Scotland, and the Secretaries of State for India and Burma is statutory. See Jennings, *The Law and the Constitution* (2nd ed., 1938), pp. 86-88.—Ed.

<sup>2</sup> In 1938 the greater part of this authority is statutory. See Intro. pp. lxxii, lxxix, *ante*.—Ed.

Part III. Secretary of State (under conditions provided by the Act) to override the ordinary law of the land and hand over a foreigner to his own government for trial. With the exercise, however, of such discretion as is conferred on the Crown or its servants by Parliamentary enactments we need hardly concern ourselves. The mode in which such discretion is to be exercised is, or may be, more or less clearly defined by the Act itself, and is often so closely limited as in reality to become the subject of legal decision, and thus pass from the domain of constitutional morality into that of law properly so called. The discretionary authority of the Crown originates generally, not in Act of Parliament, but in the prerogative—a term which has caused more perplexity to students than any other expression referring to the constitution. The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.<sup>1</sup> The King was originally in truth what he still is in name, the sovereign, or, if not strictly the sovereign in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power. In 1791 the House of Commons compelled the government of the day, a good deal against the will of Ministers, to put on trial Mr. Reeves, the learned author of the *History of English Law*, for the expression of opinions meant to exalt the prerogative of the Crown at the expense of the authority of the House of

<sup>1</sup> Cited by Lord Dunedin in *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, at p. 526.

Commons. Among other statements for the publication of which he was indicted, was a lengthy comparison of the Crown to the trunk, and the other parts of the constitution to the branches and leaves of a great tree. This comparison was made with the object of drawing from it the conclusion that the Crown was the source of all legal power, and that while to destroy the authority of the Crown was to cut down the noble oak under the cover of which Englishmen sought refuge from the storms of Jacobinism, the House of Commons and other institutions were but branches and leaves which might be lopped off without serious damage to the tree.<sup>1</sup> The publication of Mr. Reeves's theories during a period of popular excitement may have been injudicious. But a jury, one is happy to know, found that it was not seditious; for his views undoubtedly rested on a sound basis of historical fact.

The power of the Crown was in truth anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative. If therefore we omit from view (as

<sup>1</sup> See (1796) 29 St. Tr., at pp. 530-534.



Part III. we conveniently may do) powers conferred on the Crown or its servants by Parliamentary enactments, as for example under an Aliens Act, we may use the term "prerogative" as equivalent to the discretionary authority of the executive, and then lay down that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is to be exercised, or (what is really the same thing) for fixing the manner in which any transaction which can legally be done in virtue of the Royal prerogative (such as the making of war or the declaration of peace) ought to be carried out. This statement holds good, it should be noted, of all the discretionary powers exercised by the executive, otherwise than under statutory authority; it applies to acts really done by the King himself in accordance with his personal wishes, to transactions (which are of more frequent occurrence than modern constitutionalists are disposed to admit) in which both the King and his Ministers take a real part, and also to that large and constantly increasing number of proceedings which, though carried out in the King's name, are in truth wholly the acts of the Ministry. The conventions of the constitution are in short rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the King himself or by the Ministry. That this is so may be seen by the ease and the technical correctness with which such conventions may be expressed in the form of regulations in reference to the exercise of the prerogative. Thus, to say that a Cabinet when outvoted on any vital question are bound in general to retire from office, is equivalent

to the assertion, that the prerogative of the Crown to dismiss its servants at the will of the King must be exercised in accordance with the wish of the Houses of Parliament; the statement that Ministers ought not to make any treaty which will not command the approbation of the Houses of Parliament,<sup>1</sup> means that the prerogative of the Crown in regard to the making of treaties—what the Americans call the “treaty-making power”—ought not to be exercised in opposition to the will of Parliament. So, again, the rule that Parliament must meet at least once a year, is in fact the rule that the Crown’s legal right or prerogative to call Parliament together at the King’s pleasure must be so exercised that Parliament meet once a year.

This analysis of constitutional understandings is open to the one valid criticism, that, though true as far as it goes, it is obviously incomplete; for there are some few constitutional customs or habits which have no reference to the exercise of the royal power. Such, for example, is the understanding—a very vague one at best—that in case of a permanent conflict between the will of the House of Commons and the will of the House of Lords the Peers must at some point give way to the Lower House.<sup>2</sup> Such, again, is, or at any rate was, the practice by which the judicial functions of the House of Lords are discharged solely by the Law Lords, or the understanding under which Divorce Acts were treated as judicial and not as legislative proceedings.<sup>3</sup> Habits such as

Some constitutional conventions refer to exercise of Parliamentary privilege.

<sup>1</sup> To-day it is the House of Commons alone, according to the view upheld by the Labour Government of 1929-1931.—Ed.

<sup>2</sup> See now Parliament Act, 1911. Intro. pp. cxxviii *et seq.*, ante, and for text of Act, App. sec. vi.

<sup>3</sup> Divorce Bills are now unnecessary; before the establishment of

**Part III.** these are at bottom customs or rules meant to determine the mode in which one or other or both of the Houses of Parliament shall exercise their discretionary powers, or, to use the historical term, their privileges.<sup>1</sup> The very use of the word privilege is almost enough to show us how to embrace all the conventions of the constitution under one general head. Between prerogative and privilege there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament. Understandings then which regulate the exercise of the prerogative determine, or are meant to determine, the way in which one member of the sovereign body, namely the Crown, should exercise its discretionary authority; understandings which regulate the exercise of privilege determine, or are meant to determine, the way in which the other members of the sovereign body should each exercise their discretionary authority. The result follows, that the conventions of the constitution, looked at as a whole, are customs, or understandings, as to the mode in which the several members of the sovereign legislative body, which, as it will be remembered, is the "King in Parliament,"<sup>2</sup> should each exercise their discretionary authority, whether

the Irish Free State in 1922 they were used by persons domiciled in Ireland who were thus excluded from the jurisdiction of the English High Court in matrimonial causes.—ED.

<sup>1</sup> Jennings points out that there are many other rules to be included in the law and custom of Parliament. The privileges, for example, are enforced by each House of the High Court of Parliament, as by a court of law; *The Law and the Constitution* (2nd ed., 1928), pp. 65-66 and p. 89.—ED.

<sup>2</sup> See p. 39, *ante*.

it be termed the prerogative of the Crown or the privileges of Parliament. Since, however, by far the most numerous and important of our constitutional understandings refer at bottom to the exercise of the prerogative, it will conduce to brevity and clearness if we treat the conventions of the constitution, as rules or customs determining the mode in which the discretionary power of the executive, or in technical language the prerogative, ought (*i.e.* is expected by the nation) to be employed.

Having ascertained that the conventions of the constitution are (in the main) rules for determining the exercise of the prerogative, we may carry our analysis of their character a step farther. They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or (to use popular though not quite accurate language) the nation.

Aim of constitutional understandings.

At this point comes into view the full importance of the distinction already insisted upon<sup>1</sup> between legal sovereignty and political sovereignty. Parliament is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any court throughout the realm.<sup>2</sup> But if Parliament be in the eye of the law a supreme legislature, the essence of representative government

<sup>1</sup> See pp. 70-76, *ante*.

<sup>2</sup> See Intro. p. xxxvii, *ante*.

Part III. is, that the legislature should represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation. That the conduct of the different parts of the legislature should be determined by rules meant to secure harmony between the action of the legislative sovereign and the wishes of the political sovereign, must appear probable from general considerations. If the true ruler or political sovereign of England were, as was once the case, the King, legislation might be carried out in accordance with the King's will by one of two methods. The Crown might itself legislate, by royal proclamations, or decrees; or some other body, such as a *Conseil d'Etat* or Parliament itself, might be allowed to legislate as long as this body conformed to the will of the Crown. If the first plan were adopted, there would be no room or need for constitutional conventions. If the second plan were adopted, the proceedings of the legislative body must inevitably be governed by some rules meant to make certain that the Acts of the legislature should not contravene the will of the Crown. The electorate is in fact the sovereign of England. It is a body which does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature. The result of this state of things would naturally be that the conduct of the legislature, which (*ex hypothesi*) cannot be governed by laws, should be regulated by understandings of which the object is to secure the conformity of Parliament to the will of the nation. And this is what has actually occurred. The conventions of the constitution now consist of customs which (whatever



their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the "sovereignty of the people."

That this is so becomes apparent if we examine into the effect of one or two among the leading articles of this code. The rule that the powers of the Crown must be exercised through Ministers who are members of one or other House of Parliament and who "command the confidence of the House of Commons," really means, that the elective portion of the legislature in effect, though by an indirect process, appoints the executive government; and, further, that the Crown, or the Ministry, must ultimately carry out, or at any rate not contravene, the wishes of the House of Commons. But as the process of representation is nothing else than a mode by which the will of the representative body or House of Commons is made to coincide with the will of the nation, it follows that a rule which gives the appointment and control of the government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation. The same thing holds good of the understanding, or habit, in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional

**Part III.** ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new peerages.<sup>1</sup> How, it may be said, is the point to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? The question is worth raising, because the answer throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation. The truth of this reply will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive, is in fact to concede that the understandings as to the action of the House of Lords and of the Crown are, what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body.<sup>2</sup>

Rules as  
to dissolution  
of Par-  
liament.

By far the most striking example of the real sense attaching to a whole mass of constitutional conventions is found in a particular instance, which appears at first sight to present a marked exception to the general principles of constitutional morality. A Ministry placed in a minority by a vote of the Commons have, in accordance with received doctrines,

<sup>1</sup> Hearn denied, as it seemed to the author, on inadequate grounds, the existence of this rule or understanding. See Hearn, *op. cit.*, p. 178.

<sup>2</sup> Cf. Bagehot, *English Constitution* (1872 ed.), pp. 25-27.

a right to demand a dissolution of Parliament. On the other hand, there are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliamentary majority, and to dissolve the Parliament by which the Ministry are supported.<sup>1</sup> The prerogative, in short, of dissolution may constitutionally be so employed as to override the will of the representative body, or, as it is popularly called, "The People's House of Parliament." This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation. But in reality it is far otherwise. The discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing House of Commons of its authority. But the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign. A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.

This is the doctrine established by the celebrated contests of 1784 and of 1834. In each instance the King dismissed a Ministry which commanded the confidence of the House of Commons. In each case there was an appeal to the country by means of a

The dissolutions of 1784 and 1834.

<sup>1</sup> See App. sec. iii; Jennings, *Cabinet Government* (1936), pp. 299-307; Evatt, *The King and his Dominion Governors* (1936), ch. ix-xii, xx.

**Part III.** dissolution. In 1784 the appeal resulted in a decisive verdict in favour of Pitt and his colleagues, who had been brought into office by the King against the will of the House of Commons. In 1834 the appeal led to a verdict equally decisive against Peel and Wellington, who also had been called to office by the Crown against the wishes of the House. The essential point to notice is that these contests each in effect admit the principle that it is the verdict of the political sovereign which ultimately determines the right or (what in politics is much the same thing) the power of a Cabinet to retain office, namely, the nation.

Much discussion, oratorical and literary, has been expended on the question whether the dissolution of 1784 or the dissolution of 1834 was constitutional.<sup>1</sup> To a certain extent the dispute is verbal, and depends upon the meaning of the word "constitutional." If we mean by it "legal," no human being can dispute that George the Third and his son could without any breach of law dissolve Parliament. If we mean "usual," no one can deny that each monarch took a very unusual step in dismissing a Ministry which commanded a majority in the House of Commons. If by "constitutional" we mean "in conformity with the fundamental principles of the constitution," we must without hesitation pronounce the conduct of George the Third constitutional, *i.e.* in conformity with the principles of the constitution as they are now understood. He believed that the nation did not approve of the policy pursued by the House of Com-

<sup>1</sup> See Emden, *The People and the Constitution* (1933), pp. 143-144, 147-148, 196-198, 205-208.

mons. He was right in this belief. No modern constitutionalist will dispute that the authority of the House of Commons is derived from its representing the will of the nation, and that the chief object of a dissolution is to ascertain that the will of Parliament coincides with the will of the nation. George the Third then made use of the prerogative of dissolution for the very purpose for which it exists. His conduct, therefore, on the modern theory of the constitution, was, as far as the dissolution went, in the strictest sense constitutional. But it is doubtful whether in 1784 the King's conduct was not in reality an innovation, though a salutary one, on the then prevailing doctrine. Any one who studies the questions connected with the name of John Wilkes, or the disputes between England and the American colonies, will see that George the Third and the great majority of George the Third's statesmen maintained up to 1784 a view of Parliamentary sovereignty which made Parliament in the strictest sense the sovereign power. To this theory Fox clung, both in his youth as a Tory and in his later life as a Whig. The greatness of Chatham and of his son lay in their perceiving that behind the Crown, behind the Revolution Families, behind Parliament itself, lay what Chatham calls the "great public," and what we should call the nation, and that on the will of the nation depended the authority of Parliament. In 1784 George the Third was led by the exigencies of the moment to adopt the attitude of Chatham and Pitt. He appealed (oddly enough) from the sovereignty of Parliament, of which he had always been the ardent champion, to that sovereignty of the people which he never



**Part III.** ceased to hold in abhorrence. Whether this appeal be termed constitutional or revolutionary is now of little moment; it affirmed decisively the fundamental principle of our existing constitution that not Parliament but the nation is, politically speaking, the supreme power in the State. On this very ground the so-called "penal" dissolution was consistently enough denounced by Burke, who at all periods of his career was opposed to democratic innovation, and far less consistently by Fox, who blended in his political creed doctrines of absolute Parliamentary sovereignty with the essentially inconsistent dogma of the sovereignty of the people.

Of William the Fourth's action it is hard to speak with decision. The dissolution of 1834 was, from a constitutional point of view, a mistake; it was justified (if at all) by the King's belief that the House of Commons did not represent the will of the nation. The belief itself turned out erroneous, but the large minority obtained by Peel, and the rapid decline in the influence of the Whigs, proved that, though the King had formed a wrong estimate of public sentiment, he was not without reasonable ground for believing that Parliament had ceased to represent the opinion of the nation. Now if it be constitutionally right for the Crown to appeal from Parliament to the electors when the House of Commons has in reality ceased to represent its constituents, there is great difficulty in maintaining that a dissolution is unconstitutional simply because the electors do, when appealed to, support the opinions of their representatives. Admit that the electors are the political sovereign of the State, and

the result appears naturally to follow, that an appeal to them by means of a dissolution is constitutional, whenever there is valid and reasonable ground for supposing that their Parliamentary representatives have ceased to represent their wishes. The constitutionality therefore of the dissolution in 1834 turns at bottom upon the still disputable question of fact, whether the King and his advisers had reasonable ground for supposing that the reformed House of Commons had lost the confidence of the nation. Whatever may be the answer given by historians to this inquiry, the precedents of 1784 and 1834 are decisive; they determine the principle on which the prerogative of dissolution ought to be exercised, and show that in modern times the rules as to the dissolution of Parliament are, like other conventions of the constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State; that, in short, the validity of constitutional maxims is subordinate and subservient to the fundamental principle of popular sovereignty.<sup>1</sup>

The necessity for dissolutions stands in close connection with the existence of Parliamentary sovereignty. Where, as in the United States, no legislative assembly is a sovereign power, the right of dissolution may be dispensed with; the constitution provides security that no change of vital importance can be effected without an appeal to the people; and the change in the character of a legislative body by the re-election of the whole or of part thereof at stated periods makes it certain that in

Relation of  
right of  
dissolution  
to Parlia-  
mentary  
sovereignty.

<sup>1</sup> Cf. Jennings, *Cabinet Government* (1936), pp. 307-318.

**Part III.** the long run the sentiment of the legislature will harmonise with the feeling of the public. Where Parliament is supreme, some further security for such harmony is necessary, and this security is given by the right of dissolution, which enables the Crown or the Ministry to appeal from the legislature to the nation. The security indeed is not absolutely complete. Crown, Cabinet, and Parliament may conceivably favour constitutional innovations which do not approve themselves to the electors. The Septennial Act could hardly have been passed in England, the Act of Union with Ireland would not, it is often asserted, have been passed by the Irish Parliament, if, in either instance, a legal revolution had been necessarily preceded by an appeal to the electorate. Here, as elsewhere, the constitutionalism of America proves of a more rigid type than the constitutionalism of England. Still, under the conditions of modern political life, the understandings which exist with us as to the right of dissolution afford nearly, if not quite, as much security for sympathy between the action of the legislature and the will of the people, as do the limitations placed on legislative power by the constitutions of American States. In this instance, as in others, the principles explicitly stated in the various constitutions of the States, and in the Federal Constitution itself, are impliedly involved in the working of English political institutions. The right of dissolution is the right of appeal to the people, and thus underlies all those constitutional conventions which, in one way or another, are intended to produce harmony between the legal and the political sovereign power.<sup>1</sup>

<sup>1</sup> See App. sec. iii, *post*, for amplification of this subject by the author.

## CHAPTER XV

### THE SANCTION BY WHICH THE CONVENTIONS OF THE CONSTITUTION ARE ENFORCED

WHAT is the sanction by which obedience to the conventions of the constitution is at bottom enforced? Chapter  
XV.

This is by far the most perplexing of the speculative questions suggested by a study of constitutional law. Let us bear in mind the dictum of Paley, that it is often far harder to make men see the existence of a difficulty, than to make them, when once the difficulty is perceived, understand its explanation, and in the first place try to make clear to ourselves what is the precise nature of a puzzle of which most students dimly recognise the existence. The  
problem to  
be solved.

Constitutional understandings are admittedly not laws; they are not (that is to say) rules which will be enforced by the courts. If a Premier were to retain office after a vote of censure passed by the House of Commons, if he were (as did Lord Palmerston under like circumstances) to dissolve, or strictly speaking to get the Crown to dissolve, Parliament, but, unlike Lord Palmerston, were to be again censured by the newly elected House of Commons, and then, after all this had taken place, were still to

**Part III.** remain at the head of the government.—no one could deny that such a Prime Minister had acted unconstitutionally. Yet no court of law would take notice of his conduct. Suppose, again, that on the passing by both Houses of an important bill, the King should refuse his assent to the measure, or (in popular language) put his “veto” on it. Here there would be a gross violation of usage, but the matter could not by any proceeding known to English law be brought before the judges. Take another instance. Suppose that Parliament were for more than a year not summoned for the despatch of business. This would be a course of proceeding of the most unconstitutional character. Yet there is no court in the land before which one could go with the complaint that Parliament had not been assembled.<sup>1</sup> Still the conventional rules of the constitution, though not laws, are, as it is constantly asserted, nearly if not quite as binding as laws. They are, or appear to be, respected quite as much as most statutory enactments, and more than many. The puzzle is to see what is the force which habitually compels obedience to rules which have not behind them the coercive power of the courts.

Partial answer, that constitutional understandings often disobeyed.

The difficulty of the problem before us cannot indeed be got rid of, but may be shifted and a good deal lessened, by observing that the invariableness of the obedience to constitutional understandings is itself more or less fictitious. The special articles of the conventional code are in fact often

<sup>1</sup> See 4 Edward III. c. 14; 16 Car. II. c. 1; and the Bill of Rights, 1689; cf. the repealed 16 Car. I. c. 1, which would have made the assembling of Parliament a matter of law.



disobeyed. A Minister sometimes refuses to retire when, as his opponents allege, he ought constitutionally to resign office; not many years have passed since the Opposition of the day argued, if not convincingly yet with a good deal of plausibility, that the Ministry had violated a rule embodied in the Bill of Rights; in 1784 the House of Commons maintained, not only by argument but by repeated votes, that Pitt had deliberately defied more than one constitutional precept, and the Whigs of 1834 brought a like charge against Wellington and Peel. Nor is it doubtful that any one who searches through the pages of Hansard will find other instances in which constitutional maxims of long standing and high repute have been set at nought. The uncertain character of the deference paid to the conventions of the constitution is concealed under the current phraseology, which treats the successful violation of a constitutional rule as a proof that the maxim was not in reality part of the constitution. If a habit or precept which can be set at nought is thereby shown not to be a portion of constitutional morality, it naturally follows that no true constitutional rule is ever disobeyed.<sup>1</sup>

Yet, though the obedience supposed to be rendered to the separate understandings or maxims of public life is to a certain extent fictitious, the assertion that they have nearly the force of law is not without meaning. Some few of the conventions of the constitution are rigorously obeyed. Parliament, for example, is summoned year by year with as much regularity as though its annual meeting were provided for by a law of nature; and (what is of more con-

But principle of conformity to will of the nation always obeyed.

<sup>1</sup> See Intro. pp. cxxxvi et seq., ante.

**Part III.** sequence) though particular understandings are of uncertain obligation, neither the Crown nor any servant of the Crown ever refuses obedience to the grand principle which, as we have seen, underlies all the conventional precepts of the constitution, namely, that government must be carried on in accordance with the will of the House of Commons, and ultimately with the will of the nation as expressed through that House. This principle is not a law; it is not to be found in the statute-book, nor is it a maxim of the common law; it will not be enforced by any ordinary judicial body. Why then has the principle itself, as also have certain conventions or understandings which are closely connected with it, the force of law? This, when the matter is reduced to its simplest form, is the puzzle with which we have to deal. It sorely needs a solution. Many writers, however, of authority, chiefly because they do not approach the constitution from its legal side, hardly recognise the full force of the difficulty which requires to be disposed of. They either pass it by, or else apparently acquiesce in one of two answers, each of which contains an element of truth, but neither of which fully removes the perplexities of any inquirer who is determined not to be put off with mere words.

Insufficient  
answers.  
Impeach-  
ment.

A reply more often suggested than formulated in so many words, is that obedience to the conventions of the constitution is ultimately enforced by the fear of impeachment.

If this view were tenable, these conventions, it should be remarked, would not be "understandings" at all, but "laws" in the truest sense of that term.

and their sole peculiarity would lie in their being laws the breach of which could be punished only by one extraordinary tribunal, namely, the High Court of Parliament. But though it may well be conceded—and the fact is one of great importance—that the habit of obedience to the constitution was originally generated and confirmed by impeachments, yet there are insuperable difficulties to entertaining the belief that the dread of the Tower and the block exerts any appreciable influence over the conduct of modern statesmen, nor even the fear of civil proceedings or criminal prosecutions. No impeachment for violations of the constitution (since for the present purpose we may leave out of account such proceedings as those taken against Lord Macclesfield, Warren Hastings, and Lord Melville) has occurred for more than a century and a half. The process, which is supposed to ensure the retirement from office of a modern Prime Minister, when placed in a hopeless minority, is, and has long been, obsolete. The arm by which attacks on freedom were once repelled has grown rusty by disuse; it is laid aside among the antiquities of the constitution, nor will it ever, we may anticipate, be drawn again from its scabbard. For, in truth, impeachment, as a means for enforcing the observance of constitutional morality, always laboured under one grave defect. The possibility of its use suggested, if it did not stimulate, one most important violation of political usage; a Minister who dreaded impeachment would, since Parliament was the only court before which he could be impeached, naturally advise the Crown not to convene Parliament. There is something like a contradiction in terms in saying that a Minister is compelled to advise the meeting of Parliament by the dread of impeachment

**Part III.** if Parliament should assemble. If the fear of Parliamentary punishment were the only difficulty in the way of violating the constitution, we may be sure that a bold party leader would, at the present day, as has been done in former centuries, sometimes suggest that Parliament should not meet.

Power of  
public  
opinion.

A second and current answer to the question under consideration is, that obedience to the conventional precepts of the constitution is ensured by the force of public opinion.

Now that this assertion is in one sense true, stands past dispute. The nation expects that Parliament shall be convened annually; the nation expects that a Minister who cannot retain the confidence of the House of Commons, shall give up his place, and no Premier even dreams of disappointing these expectations. The assertion, therefore, that public opinion gives validity to the received precepts for the conduct of public life is true. Its defect is that, if taken without further explanation, it amounts to little else than a re-statement of the very problem which it is meant to solve. For the question to be answered is, at bottom, Why is it that public opinion is, apparently at least, a sufficient sanction to compel obedience to the conventions of the constitution? and it is no answer to this inquiry to say that these conventions are enforced by public opinion. Let it also be noted that many rules of conduct which are fully supported by the opinion of the public are violated every day of the year. Public opinion enjoins the performance of promises and condemns the commission of crimes, but the settled conviction of the nation that promises ought to be kept does not hinder merchants from

going into the *Gazette*, nor does the universal execration of the villain who sheds man's blood prevent the commission of murders. That public opinion does to a certain extent check extravagance and criminality is of course true, but the operation of opinion is in this case assisted by the law, or in the last resort by the physical power at the disposal of the state. The limited effect of public opinion when aided by the police hardly explains the immense effect of opinion in enforcing rules which may be violated without any risk of the offender being brought before the courts. To contend that the understandings of the constitution derive their coercive power solely from the approval of the public, is very like maintaining the kindred doctrine that the conventions of international law are kept alive solely by moral force. Every one, except a few dreamers, perceives that the respect paid to international morality is due in great measure, not to moral force, but to the physical force in the shape of armies and navies, by which the commands of general opinion are in many cases supported; and it is difficult not to suspect that, in England at least, the conventions of the constitution are supported and enforced by something beyond or in addition to the public approval.

What then is this "something"? My answer is, that it is nothing else than the force of the law. The dread of impeachment may have established, and public opinion certainly adds influence to, the prevailing dogmas of political ethics. But the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are

True  
answer,—  
Obedience  
to conven-  
tions  
enforced  
by power  
of law.



**Part III.** expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land.

This is the true answer to the inquiry which I have raised, but it is an answer which undoubtedly requires both explanation and defence.

Explan-  
ation.

The meaning of the statement that the received precepts of the constitution are supported by the law of the land, and the grounds on which that statement is based, can be most easily made apparent by considering what would be the legal results which would inevitably ensue from the violation of some indisputable constitutional maxim.

Yearly  
meeting  
of Parlia-  
ment.

No rule is better established than that Parliament must assemble at least once a year. This maxim, as before pointed out, is certainly not derived from the common law, and is not based upon any statutory enactment. Now suppose that Parliament were prorogued once and again for more than a year, so that for two years no Parliament sat at Westminster. Here we have a distinct breach of a constitutional practice or understanding, but we have no violation of law. What, however, would be the consequences which would ensue? They would be, speaking generally, that any Ministry who at the present day sanctioned or tolerated this violation of the constitution, and every person connected with the government, would immediately come into conflict with the law of the land.

A moment's reflection shows that this would be so. The Army (Annual) Act<sup>1</sup> would in the first place

<sup>1</sup> Since 1917, Army and Air Force (Annual) Act.

expire. Hence the Army Act,<sup>1</sup> on which the discipline of the army depends, would cease to be in force.<sup>2</sup> But thereupon all means of controlling the army without a breach of law would cease to exist. Either the army must be discharged, in which case the means of maintaining law and order would come to an end, or the army must be kept up and discipline must be maintained without legal authority for its maintenance. If this alternative were adopted, every person, from the Commander-in-Chief downwards, who took part in the control of the army, and indeed every soldier who carried out the commands of his superiors, would find that not a day passed without his committing or sanctioning acts which would render him liable to stand as a criminal in the dock. Then, again, though most of the taxes would still come into the Exchequer, large portions of the revenue would cease to be legally due and could not be legally collected, whilst every official, who acted as collector, would expose himself to actions or prosecutions.<sup>3</sup> The part, moreover, of the revenue which came in, could not be legally applied to the purposes of the government. If the Ministry laid hold of the revenue they would find it difficult to avoid breaches of definite laws which would compel them to appear before the courts. Suppose however that the Cabinet were willing to defy the law. Their criminal daring would not suffice for its purpose; they could not get

<sup>1</sup> Extended to the Air Force by the Air Force (Constitution) Act, 1917, s. 12.

<sup>2</sup> See p. 309, note 2, *ante*, and Jennings. *The Law and the Constitution* (2nd ed., 1938), p. 124.

<sup>3</sup> By convention income tax and sur tax and one indirect tax (tea duty) are imposed anew by the annual Finance Act.

Part III. hold of the revenue without the connivance or aid of a large number of persons, some of them indeed officials, but some of them, such as the Comptroller General, the Governors of the Bank of England, and the like, unconnected with the administration. None of these officials, it should be noted, could receive from the government or the Crown any protection against legal liability; and any person, *e.g.* the Commander-in-Chief, or the colonel of a regiment, who employed force to carry out the policy of the government would be exposed to resistance supported by the courts. For the law (it should always be borne in mind) operates in two different ways. It inflicts penalties and punishment upon law-breakers, and (what is of equal consequence) it enables law-respecting citizens to refuse obedience to illegal commands. It legalises passive resistance. The efficacy of such legal opposition is immensely increased by the non-existence in England of anything resembling the *droit administratif* of France,<sup>1</sup> or of that wide discretionary authority which is possessed by every continental government. The result is, that an administration which attempted to dispense with the annual meeting of Parliament could not ensure the obedience even of its own officials, and, unless prepared distinctly to violate the undoubted law of the land, would find itself not only opposed but helpless.

The rule, therefore, that Parliament must meet once a year, though in strictness a constitutional convention which is not a law and will not be enforced by the courts, turns out nevertheless to be

<sup>1</sup> See ch. xii, *ante*; cf. App. sec. i (1), (2), (4).

an understanding which cannot be neglected without involving hundreds of persons, many of whom are by no means specially amenable to government influence, in distinct acts of illegality cognisable by the tribunals of the country. This convention therefore of the constitution is in reality based upon, and secured by, the law of the land.

This no doubt is a particularly plain case. I have examined it fully, both because it is a particularly plain instance, and because the full understanding of it affords the clue which guides us to the principle on which really rests such coercive force as is possessed by the conventions of the constitution.

To see that this is so let us consider for a moment the effect of disobedience by the government to one of the most purely conventional among the maxims of constitutional morality,—the rule, that is to say, that a Ministry ought to retire on a vote that they no longer possess the confidence of the House of Commons. Suppose that a Ministry, after the passing of such a vote, were to act at the present day as Pitt acted in 1783, and hold office in the face of the censure passed by the House. There would clearly be a *prima facie* breach of constitutional ethics. What must ensue is clear. If the Ministry wished to keep within the constitution they would announce their intention of appealing to the constituencies, and the House would probably assist in hurrying on a dissolution. All breach of law would be avoided, but the reason of this would be that the conduct of the Cabinet would not be a breach of constitutional morality; for the true rule of the constitution admittedly is, not that a Ministry cau-

Resigna-  
tion of  
Ministry  
which has  
lost con-  
fidence of  
the House  
of Com-  
mons.

**Part III.** not keep office when censured by the House of Commons, but that under such circumstances a Ministry ought not to remain in office unless they can by an appeal to the country obtain the election of a House which will support the government.<sup>1</sup> Suppose then that, under the circumstances I have imagined, the Ministry either would not recommend a dissolution of Parliament, or, having dissolved Parliament and being again censured by the newly elected House of Commons, would not resign office. It would, under this state of things, be as clear as day that the understandings of the constitution had been violated. It is however equally clear that the House would have in their own hands the means of ultimately forcing the Ministry either to respect the constitution or to violate the law. Sooner or later the moment would come for passing the Army (Annual) Act or the Appropriation Act, and the House by refusing to pass either of these enactments would involve the Ministry in all the inextricable embarrassments which (as I have already pointed out) immediately follow upon the omission to convene Parliament for more than a year.<sup>2</sup> The breach, therefore, of a purely conventional rule, of a maxim utterly unknown and indeed opposed to the theory of English law, ultimately entails upon those who break it direct conflict with the undoubted law of the land. We have then a right to assert that the force which in

<sup>1</sup> See Jennings, *Cabinet Government* (1936), p. 313.

<sup>2</sup> The Army and Air Force (Annual) Act, as it is now, is passed in April, the Appropriation Act at the end of July. Therefore a defeated Ministry could remain in office from August to April without breaking the law.—Jennings, *The Law and the Constitution* (2nd ed., 1938), p. 124.



the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not laws, but, in so far as they really possess binding force, derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a law-breaker.

It is worth while to consider one or two objections which may be urged with more or less plausibility against the doctrine that the obligatory force of constitutional morality is derived from the law itself.

The government, it is sometimes suggested, may by the use of actual force carry through a *coup d'état* and defy the law of the land.

Law may  
be over-  
powered  
by force.

This suggestion is true, but is quite irrelevant. No constitution can be absolutely safe from revolution or from a *coup d'état*; but to show that the laws may be defied by violence does not touch or invalidate the statement that the understandings of the constitution are based upon the law. They have certainly no more force than the law itself. A Minister who, like the French President in 1851, could override the law could of course overthrow the constitution. The theory propounded aims only at proving that when constitutional understandings have nearly the force of law they derive their power from the fact that they cannot be broken without a breach of law. No one is concerned to show, what indeed never can be shown, that the law can never be defied, or the constitution never be overthrown.

It should further be observed that the admitted sovereignty of Parliament tends to prevent violent

**Part III.** attacks on the constitution. Revolutionists or conspirators generally believe themselves to be supported by the majority of the nation, and, when they succeed, this belief is in general well founded. But in modern England, a party, however violent, who count on the sympathy of the people, can accomplish by obtaining a Parliamentary majority all that could be gained by the success of a revolution. When a spirit of reaction or of innovation prevails throughout the country, a reactionary or revolutionary policy is enforced by Parliament without any party needing to make use of violence. The oppressive legislation of the Restoration in the seventeenth century, and the anti-revolutionary legislation of the Tories from the outbreak of the Revolution till the end of George the Third's reign, saved the constitution from attack. A change of spirit averted a change of form; the flexibility of the constitution proved its strength.

Parliament  
has never  
refused  
to pass  
Mutiny  
Act.

If the maintenance of political morality, it may with some plausibility be asked, really depends on the right of Parliament to refuse to pass laws such as the Army (Annual) Act, which are necessary for the maintenance of order, and indeed for the very existence of society, how does it happen that no English Parliament has ever employed this extreme method of enforcing obedience to the constitution?

The true answer to the objection thus raised appears to be that the observance of the main and the most essential of all constitutional rules, the rule, that is to say, requiring the annual meeting of Parliament, is ensured, without any necessity for Parliamentary

action, by the temporary character of the Mutiny Act, and that the power of Parliament to compel obedience to its wishes by refusing to pass the Act is so complete that the mere existence of the power has made its use unnecessary. In matter of fact, no Ministry has since the Revolution of 1689 ever defied the House of Commons, unless the Cabinet could confide in the support of the country, or, in other words, could count on the election of a House which would support the policy of the government. To this we must add, that in the rare instances in which a Minister has defied the House, the refusal to pass the Mutiny Act has been threatened or contemplated. Pitt's victory over the Coalition is constantly cited as a proof that Parliament cannot refuse to grant supplies or to pass an Act necessary for the discipline of the army. Yet any one who studies with care the great "Case of the Coalition" will see that it does not support the dogma for which it is quoted. Fox and his friends did threaten and did intend to press to the very utmost all the legal powers of the House of Commons. They failed to carry out their intention solely because they at last perceived that the majority of the House did not represent the will of the country. What the "leading case" shows is, that the Cabinet, when supported by the Crown, and therefore possessing the power of dissolution, can defy the will of a House of Commons if the House is not supported by the electors. Here we come round to the fundamental dogma of modern constitutionalism; the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation. This the conclusion in reality established by the events of 1784. Pitt over-

**Part III.** rode the customs, because he adhered to the principles, of the constitution. He broke through the received constitutional understandings without damage to his power or reputation; he might in all probability have in case of necessity broken the law itself with impunity. For had the Coalition pressed their legal rights to an extreme length, the new Parliament of 1784 would in all likelihood have passed an Act of Indemnity for illegalities necessitated, or excused, by the attempt of an unpopular faction to drive from power a Minister supported by the Crown, by the Peers, and by the nation. However this may be, the celebrated conflict between Pitt and Fox lends no countenance to the idea that a House of Commons supported by the country would not enforce the morality of the constitution by placing before any Minister who defied its precepts the alternative of resignation or revolution.<sup>1</sup>

Sub-  
ordinate  
inquiries.

A clear perception of the true relation between the conventions of the constitution and the law of the land supplies an answer to more than one subordinate question which has perplexed students and commentators.

Why has  
Impeach-  
ment gone  
out of use?

How is it that the ancient methods of enforcing Parliamentary authority, such as impeachment, the formal refusal of supplies, and the like, have fallen into disuse?

The answer is, that they are disused because ultimate obedience to the underlying principle of all

<sup>1</sup> It is further not the case that the idea of refusing supplies is unknown to modern statesmen. In 1868 such refusal was threatened in order to force an early dissolution of Parliament; in 1886 the dissolution took place before the supplies were fully granted, and the supplies granted were granted for only a limited period.

modern constitutionalism, which is nothing else than the principle of obedience to the will of the nation as expressed through Parliament, is so closely bound up with the law of the land that it can hardly be violated without a breach of the ordinary law. Hence the extraordinary remedies, which were once necessary for enforcing the deliberate will of the nation, having become unnecessary, have fallen into desuetude. If they are not altogether abolished, the cause lies partly in the conservatism of the English people, and partly in the valid consideration that crimes may still be occasionally committed for which the ordinary law of the land hardly affords due punishment, and which therefore may well be dealt with by the High Court of Parliament.

Why is it that the understandings of the constitution have about them a singular element of vagueness and variability?

Why are constitutional understandings variable?

Why is it, to take definite instances of this uncertainty and changeableness, that no one can define with absolute precision the circumstances under which a Prime Minister ought to retire from office? Why is it that no one can fix the exact point at which resistance of the House of Lords to the will of the House of Commons becomes unconstitutional? and how does it happen that the Peers could at one time arrest legislation in a way which now would be generally held to involve a distinct breach of constitutional morality? What is the reason why no one can describe with precision the limits to the influence on the conduct of public affairs which may rightly be exerted by the reigning monarch? and how does it happen that George the Third and even George the



Part III. Fourth each made his personal will or caprice tell on the policy of the nation in a very different way and degree from that in which Queen Victoria ever attempted to exercise personal influence over matters of State?

The answer in general terms to these and the like inquiries is, that the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance, and ultimately to the will of the nation as expressed through Parliament. The conventional code of political morality is, as already pointed out, merely a body of maxims meant to secure respect for this principle. Of these maxims some indeed—such, for example, as the rule that Parliament must be convoked at least once a year—are so closely connected with the respect due to Parliamentary or national authority, that they will never be neglected by any one who is not prepared to play the part of a revolutionist; such rules have received the undoubted stamp of national approval, and their observance is secured by the fact that whoever breaks or aids in breaking them will almost immediately find himself involved in a breach of law. Other constitutional maxims stand in a very different position. Their maintenance up to a certain point tends to secure the supremacy of Parliament, but they are themselves vague, and no one can say to what extent the will of Parliament or the nation requires their rigid observance; they therefore obtain only a varying and indefinite amount of obedience.

Thus the rule that a Ministry who have lost the confidence of the House of Commons should retire

from office is plain enough, and any permanent neglect of the spirit of this rule would be absolutely inconsistent with Parliamentary government, and would finally involve the Minister who broke the rule in acts of undoubted illegality. But when you come to inquire what are the signs by which you are to know that the House has withdrawn its confidence from a Ministry,—whether, for example, the defeat of an important Ministerial measure or the smallness of a Ministerial majority is a certain proof that a Ministry ought to retire,—you ask a question which admits of no absolute reply.<sup>1</sup> All that can be said is, that a Cabinet ought not to continue in power (subject, of course, to the one exception on which I have before dwelt<sup>2</sup>) after the expression by the House of Commons of a wish for the Cabinet's retirement. Of course, therefore, a Minister or a Ministry must resign if the House passes a vote of want of confidence. There are, however, a hundred signs of Parliamentary disapproval which, according to circumstances, either may or may not be a sufficient notice that a Minister ought to give up office. The essential thing is that the Ministry should obey the House as representing the nation. But the question whether the House of Commons has or has not indirectly intimated its will that a Cabinet should give up office is not a matter as to which any definite principle can be

Chapter  
XV.

With-  
drawal of  
confidence  
by House of  
Commons.

<sup>1</sup> See Hearn, *Government of England* (2nd ed., 1887), ch. ix. for an attempt to determine the circumstances under which a Ministry ought or ought not to keep office. See debate in House of Commons of 24th July, 1905, for consideration of, and reference to, precedents with regard to the duty of a Ministry to retire from office when they have lost the confidence of the House of Commons.—*Parl. Deb., H. of C.*, 4th ser., vol. 150, col. 50.

<sup>2</sup> See pp. 432-438, *ante*.

**Part III.** laid down. The difficulty which now exists, in settling the point at which a Premier and his colleagues are bound to hold that they have lost the confidence of the House, is exactly analogous to the difficulty which often perplexed statesmen of the last century, of determining the point at which a Minister was bound to hold he had lost the then essential confidence of the King. The ridiculous efforts of the Duke of Newcastle to remain at the head of the Treasury, in spite of the broadest hints from Lord Bute that the time had come for resignation, are exactly analogous to the undignified persistency with which later Cabinets have occasionally clung to office in the face of intimations that the House desired a change of government. As long as a master does not directly dismiss a servant, the question whether the employer's conduct betrays a wish that the servant should give notice must be an inquiry giving rise to doubt and discussion. And if there be sometimes a difficulty in determining what is the will of Parliament, it must often of necessity be still more difficult to determine what is the will of the nation, or, in other words, of the majority of the electors.

When  
House of  
Lords  
should give  
way to  
Commons.

The general rule that the House of Lords must in matters of legislation ultimately give way to the House of Commons is one of the best-established maxims of modern constitutional ethics. But if any inquirer asks how the point at which the Peers are to give way is to be determined, no answer which even approximates to the truth can be given, except the very vague reply that the Upper House must give way whenever it is clearly proved that the will of the House of Commons represents the deliberate will of

the nation. The nature of the proof differs under different circumstances.<sup>1</sup>

When once the true state of the case is perceived, it is easy to understand a matter which, on any cut-and-dried theory of the constitution, can only with difficulty be explained, namely, the relation occupied by modern Cabinets towards the House of Lords. It is certain that for more than half a century Ministries have constantly existed which did not command the confidence of the Upper House, and that such Ministries have, without meeting much opposition on the part of the Peers, in the main carried out a policy of which the Peers did not approve.<sup>2</sup> It is also certain that while the Peers have been forced to pass many bills which they disliked, they have often exercised large though very varying control over the course of legislation. Between 1834 and 1840 the Upper House, under the guidance of Lord Lyndhurst, repeatedly and with success opposed Ministerial measures which had passed the House of Commons. For many years Jews were kept out of Parliament simply because the Lords were not prepared to admit them. If you search for the real cause of this state of things, you will find that it was nothing else than the fact, constantly concealed under the misleading rhetoric of party warfare, that on the matters in question the electors were not prepared to support the Cabinet in taking the steps necessary to compel the submission of the House of Lords. On any matter upon which the electors are firmly resolved, a Premier, who is in

<sup>1</sup> See Intro. pp. cxxviii *et seq.*, *ante*; and Parliament Act, 1911, the text of which is given in App. sec. vi.

<sup>2</sup> And also from 1906 to 1914, in 1924, and from 1929-31.

Part III. effect the representative of the House of Commons, has the means of coercion, namely, by the creation of Peers. In a country indeed like England, things are rarely carried to this extreme length. The knowledge that a power can be exercised constantly prevents its being actually put in force. This is so even in private life; most men pay their debts without being driven into court, but it were absurd to suppose that the possible compulsion of the courts and the sheriff has not a good deal to do with regularity in the payment of debts. The acquiescence of the Peers in measures which the Peers do not approve arises at bottom from the fact that the nation, under the present constitution, possesses the power of enforcing, through very cumbersome machinery, the submission of the Peers to the conventional rule that the wishes of the House of Lords must finally give way to the decisions of the House of Commons. But the rule itself is vague, and the degree of obedience which it obtains is varying, because the will of the nation is often not clearly expressed, and further, in this as in other matters, is itself liable to variation. If the smoothness with which the constitutional arrangements of modern England work should, as it often does, conceal from us the force by which the machinery of the constitution is kept working, we may with advantage consult the experience of English colonies. No better example can be given of the methods by which a Representative Chamber attempts in the last resort to compel the obedience of an Upper House than is afforded by the varying phases of the conflict which raged in Victoria during 1878 and 1879 between the two Houses of the Legislature. There the Lower House attempted to



enforce upon the Council the passing of measures which the Upper House did not approve, by, in effect, inserting the substance of a rejected bill in the Appropriation Bill. The Council in turn threw out the Appropriation Bill. The Ministry thereupon dismissed officials, magistrates, county court judges, and others, whom they had no longer the means to pay, and attempted to obtain payments out of the Treasury on the strength of resolutions passed solely by the Lower House. At this point, however, the Ministry came into conflict with an Act of Parliament, that is, with the law of the land. The contest continued under different forms until a change in public opinion finally led to the election of a Lower House which could act with the Council. With the result of the contest we are not concerned. Three points, however, should be noticed. The conflict was ultimately terminated in accordance with the expressed will of the electors; each party during its course put in force constitutional powers hardly ever in practice exerted in England; as the Council was elective, the Ministry did not possess any means of producing harmony between the two Houses by increasing the number of the Upper House. It is certain that if the Governor could have nominated members of the Council, the Upper House would have yielded to the will of the Lower, in the same way in which the Peers always in the last resort bow to the will of the House of Commons.

How is it, again, that all the understandings which are supposed to regulate the personal relation of the Crown to the actual work of government are marked by the utmost vagueness and uncertainty?

Why is the personal influence of the Crown uncertain?

**Part III.**

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The matter is, to a certain extent at any rate, explained by the same train of thought as that which we have followed out in regard to the relation between the House of Lords and the Ministry. The revelations of political memoirs and the observation of modern public life make quite clear two points, both of which are curiously concealed under the mass of antiquated formulas which hide from view the real working of our institutions. The first is, that while every act of State is done in the name of the Crown, the real executive government of England is the Cabinet. The second is, that though the Crown has no real concern in a vast number of the transactions which take place under the Royal name, no one of the King's predecessors, nor, it may be presumed, the King himself, has ever acted upon or affected to act upon the maxim originated by Thiers, that "the King reigns but does not govern." George the Third took a leading part in the work of administration; his two sons, each in different degrees and in different ways, made their personal will and predilections tell on the government of the country. No one really supposes that there is not a sphere, though a vaguely defined sphere, in which the personal will of the King has under the constitution very considerable influence. The strangeness of this state of things is, or rather would be to any one who had not been accustomed from his youth to the mystery and formalism of English constitutionalism, that the rules or customs which regulate the personal action of the Crown are utterly vague and undefined. The reason of this will, however, be obvious to any one who has followed these chapters. The personal in-

fluence of the Crown exists, not because acts of State are done formally in the Crown's name, but because neither the legal sovereign power, namely Parliament, nor the political sovereign, namely the nation, wishes that the reigning monarch should be without personal weight in the government of the country. The customs or understandings which regulate or control the exercise of the King's personal influence are vague and indefinite, both because statesmen feel that the matter is one hardly to be dealt with by precise rules, and because no human being knows how far and to what extent the nation wishes that the voice of the reigning monarch should command attention.<sup>1</sup> All that can be asserted with certainty is, that on this matter the practice of the Crown and the wishes of the nation have from time to time varied. George the Third made no use of the so-called veto which had been used by William the Third; but he more than once insisted upon his will being obeyed in matters of the highest importance. None of his successors have after the manner of George the Third made their personal will decisive as to general measures of policy. In small things as much as in great one can discern a tendency to transfer to the Cabinet powers once actually exercised by the King. The scene between Jeanie Deans and Queen Caroline is a true picture of a scene which might have taken place under George the Second; George the Third's firmness secured the execution of Dr. Dodd. At the present day the right of pardon belongs in fact

<sup>1</sup> See Evatt, *The King and his Dominion Governors* (1936), for a plea for the formulation of conventional rules which determine the Sovereign's exercise of his powers.

Part III. to the Home Secretary. A modern Jeanie Deans would be referred to the Home Office; the question whether a popular preacher should pay the penalty of his crimes would now, with no great advantage to the country, be answered, not by the King, but by the Cabinet.

The effect  
of surviv-  
ing pre-  
rogatives  
of Crown.

What, again, is the real effect produced by the survival of prerogative powers?

Here we must distinguish two different things, namely, the way in which the existence of the prerogative affects the personal influence of the King, and the way in which it affects the power of the executive government.

The fact that all important acts of State are done in the name of the King<sup>1</sup> and in most cases with the cognisance of the King, and that many of these acts, such, for example, as the appointment of judges or the creation of bishops, or the conduct of negotiations with foreign powers and the like, are exempt from the direct control or supervision of Parliament, gives the reigning monarch an opportunity for exercising great influence on the conduct of affairs; and Bagehot has marked out, with his usual subtlety, the mode in which the mere necessity under which Ministers are placed of consulting with and giving information to the King secures a wide sphere for the exercise of legitimate influence by a constitutional ruler.

But though it were a great error to underrate the extent to which the formal authority of the Crown confers real power upon the King, the far more

<sup>1</sup> This is no longer true even of some Departments of the Central Government, *e.g.* Ministry of Health.—Ed.

important matter is to notice the way in which the survival of the prerogative affects the position of the Cabinet. It leaves in the hands of the Premier and his colleagues, large powers which can be exercised, and constantly are exercised, free from Parliamentary control. This is especially the case in all foreign affairs. Parliament may censure a Ministry for misconduct in regard to the foreign policy of the country. But a treaty made by the Crown, or in fact by the Cabinet, is valid without the authority or sanction of Parliament; and it is even open to question whether the treaty-making power of the executive might not in some cases override the law of the land.<sup>1</sup> However this may be, it is not Parliament, but the Ministry, who direct the diplomacy of the nation, and virtually decide all questions of peace or war. The founders of the American Union showed their full appreciation of the latitude left to the executive government under the English constitution by one of the most remarkable of their innovations upon it. They lodged the treaty-making power in the hands, not of the President, but of the President and the Senate; and further gave to the Senate a right of veto on Presidential appointments to office. These arrangements supply a valuable illustration of the way in which restrictions on the prerogative become re-

<sup>1</sup> The *Parlement Belge* (1879) 4 P.D. 129; on appeal (1880) 5 P.D. 197. "Whether the power [of the Crown to compel its subjects "to obey the provisions of a treaty] does exist in the case of treaties of "peace, and whether if so it exists equally in the case of treaties akin "to a treaty of peace, or whether in both or either of these cases inter- "ference with private rights can be authorised otherwise than by the "legislature, are grave questions upon which their Lordships do not "find it necessary to express an opinion." *Walker v. Baird* [1892] A.C. 491, at p. 497; K. & L. 310, at p. 312.



Part III. strictions on the discretionary authority of the executive. Were the House of Lords to have conferred upon it by statute the rights of the Senate, the change in our institutions would be described with technical correctness as the limitation of the prerogative of the Crown as regards the making of treaties and of official appointments. But the true effect of the constitutional innovation would be to place a legal check on the discretionary powers of the Cabinet.

The survival of the prerogative, conferring as it does wide discretionary authority upon the Cabinet, involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the State. When the King was the chief member of the sovereign body, Ministers were in fact no less than in name the King's servants. At periods of our history when the Peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the Peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out, or tend to carry out, the will of the House. When however the Cabinet cannot act except by means of legislation, other considerations come into play. A law requires the sanction of the House of Lords. No government can increase its statutory authority without obtaining the sanction of the Upper

Chamber. Thus an Act of Parliament when passed represents, not the absolute wishes of the House of Commons, but these wishes as modified by the influence of the House of Lords. The Peers no doubt will in the long run conform to the wishes of the electorate. But the Peers may think that the electors will disapprove of, or at any rate be indifferent to, a bill which meets with the approval of the House of Commons. Hence while every action of the Cabinet which is done in virtue of the prerogative is in fact though not in name under the direct control of the representative chamber, all powers which can be exercised only in virtue of a statute are more or less controlled in their creation by the will of the House of Lords; they are further controlled in their exercise by the interference of the courts. One example, taken from the history of recent years, illustrates the practical effect of this difference.<sup>1</sup> In 1872 the Ministry of the day carried a bill through the House of Commons abolishing the system of purchase in the army. The bill was rejected by the Lords: the Cabinet then discovered that purchase could be abolished by Royal warrant, *i.e.* by something very like the exercise of the prerogative.<sup>2</sup> The system was then and there abolished. The change, it will probably be conceded, met with the approval, not only of the Commons, but of the electors. But it will equally be conceded that had the alteration required

<sup>1</sup> On this subject there are remarks worth noting in Stephen, *Life of Fawcett* (1885), pp. 271, 272.

<sup>2</sup> Purchase was not abolished by the prerogative in the ordinary legal sense of the term. A statute prohibited the sale of offices except in so far as might be authorised in the case of the army by Royal warrant. When therefore the warrant authorising the sale was cancelled, the statute took effect.

**Part III.** statutory authority the system of purchase might have continued in force up to the present day. The existence of the prerogative enabled the Ministry in this particular instance to give immediate effect to the wishes of the electors, and this is the result which, under the circumstances of modern politics, the survival of the prerogative will in every instance produce. The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagehot describes the powers which can still legally be exercised by the Crown without consulting Parliament; and should remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which in its turn obeys the behests of the electors.

"I said in this book that it would very much surprise people if they were only told how many things the Queen could do without consulting Parliament, and it certainly has so proved, for when the Queen abolished purchase in the army by an act of prerogative (after the Lords had rejected the bill for doing so), there was a great and general astonishment.

"But this is nothing to what the Queen can by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General commanding-in-chief downwards; she could dis-

“miss all the sailors too; she could sell off all our  
 “ships-of-war and all our naval stores; she could  
 “make a peace by the sacrifice of Cornwall, and begin  
 “a war for the conquest of Brittany. She could make  
 “every citizen in the United Kingdom, male or  
 “female, a peer; she could make every parish in  
 “the United Kingdom a ‘university’; she could  
 “dismiss most of the civil servants; she could pardon  
 “all offenders. In a word, the Queen could by  
 “prerogative upset all the action of civil govern-  
 “ment within the government, could disgrace the  
 “nation by a bad war or peace, and could, by dis-  
 “banding our forces, whether land or sea, leave us  
 “defenceless against foreign nations.”<sup>1</sup>

If government by Parliament is ever transformed into government by the House of Commons, the transformation will, it may be conjectured, be effected by use of the prerogatives of the Crown.<sup>2</sup>

Let us cast back a glance for a moment at the results which we have obtained by surveying the English constitution from its legal side. Conclusion

The constitution when thus looked at ceases to appear a “sort of maze”; it is seen to consist of two different parts; the one part is made up of understandings, customs, or conventions which, not being enforced by the courts, are in no true sense of the word laws; the other part is made up of rules which are

<sup>1</sup> Bagehot, *English Constitution* (1872 ed.), Intro. pp. xxxv, xxxvi.

<sup>2</sup> Or, as in 1832 and 1911, by the threat of its use, e.g. to create peers. See Jennings, *Cabinet Government* (1936), pp. 319-338. esp. p. 335.

Dicey, by modern standards, over-emphasises in these pages the importance of the prerogative. Modern government is a matter largely of statutory power.—ED.

Part III. enforced by the courts, and which, whether embodied in statutes or not, are laws in the strictest sense of the term, and make up the true law of the constitution.

This law of the constitution is, we have further found, in spite of all appearances to the contrary, the true foundation on which the English polity rests, and it gives in truth even to the conventional element of constitutional law such force as it really possesses.<sup>1</sup>

The law of the constitution, again, is in all its branches the result of two guiding principles, which have been gradually worked out by the more or less conscious efforts of generations of English statesmen and lawyers.

The first of these principles is the sovereignty of Parliament, which means in effect the gradual transfer of power from the Crown to a body which has come more and more to represent the nation.<sup>2</sup> This curious

<sup>1</sup> See pp. 439-454, *ante*.

<sup>2</sup> A few words may be in place as to the method by which this transfer was accomplished. The leaders of the English people in their contests with Royal power never attempted, except in periods of revolutionary violence, to destroy or dissipate the authority of the Crown as head of the State. Their policy, continued through centuries, was to leave the power of the King untouched, but to bind down the action of the Crown to recognised modes of procedure which, if observed, would secure first the supremacy of the law, and ultimately the sovereignty of the nation. The King was acknowledged to be supreme judge, but it was early established that he could act judicially only in and through his courts; the King was recognised as the only legislator, but he could enact no valid law except as King in Parliament; the King held in his hands all the prerogatives of the executive government, but, as was after long struggles determined, he could legally exercise these prerogatives only through Ministers who were members of his Council, and incurred responsibility for his acts. Thus the personal will of the King was gradually identified with and transformed into the lawful and legally expressed will of the Crown. This transformation was based upon the constant use of fictions. It bears on its face that it was the invention of lawyers. If proof of this



process, by which the personal authority of the King has been turned into the sovereignty of the King in Parliament, has had two effects: it has put an end to the arbitrary powers of the monarch; it has preserved intact and undiminished the supreme authority of the State.

The second of these principles is what I have called the "rule of law," or the supremacy throughout all our institutions of the ordinary law of the land. This rule of law, which means at bottom the right of the courts to punish any illegal act by whomsoever committed, is of the very essence of English institutions. If the sovereignty of Parliament gives the form, the supremacy of the law of the land determines the substance of our constitution. The English constitution in short, which appears when looked at from one point of view to be a mere collection of practices or customs, turns out, when examined in its legal aspect, to be more truly than any other polity in the world, except the Constitution of the United States,<sup>1</sup> based on the law of the land.

When we see what are the principles which truly

were wanted, the author found it in the fact that the "Parliaments" of France towards the end of the eighteenth century tried to use against the fully-developed despotism of the French monarchy, fictions recalling the arts by which, at a far earlier period, English constitutionalists had nominally checked the encroachments, while really diminishing the sphere, of the royal prerogative. Legal statesmanship bears everywhere the same character. See Rocquain, *L'esprit révolutionnaire avant la Révolution* (1878).

<sup>1</sup> The constitution of the United States, as it actually exists, rests to a considerable extent on case law.

Marshall, C.J., as the "expounder of the constitution," may almost be reckoned among the builders, if not the founders, of the American policy. See for a collection of his judgments on constitutional questions, *The Writings of John Marshall on the Federal Constitution* (1839).

Part III. underlie the English polity, we also perceive how rarely they have been followed by foreign statesmen who more or less intended to copy the constitution of England. The sovereignty of Parliament is an idea fundamentally inconsistent with the notions which govern the inflexible or rigid constitutions existing in by far the most important of the countries which have adopted any scheme of representative government. The "rule of law" is a conception which in the United States indeed has received a development beyond that which it has reached in England; but it is an idea not so much unknown to as deliberately rejected by the constitution-makers of France, and of other continental countries which have followed French guidance. For the supremacy of the law of the land means in the last resort the right of the judges to control the executive government, whilst the *séparation des pouvoirs* means, as construed by Frenchmen, the right of the government to control the judges. The authority of the Courts of Law as understood in England can therefore hardly coexist with the system of *droit administratif* as it prevails in France. We may perhaps even go so far as to say that English legalism is hardly consistent with the existence of an official body which bears any true resemblance to what foreigners call "the administration." To say this is not to assert that foreign forms of government are necessarily inferior to the English constitution, or unsuited for a civilised and free people. All that necessarily results from an analysis of our institutions, and a comparison of them with the institutions of foreign countries, is, that the English constitution is still marked, far more deeply

than is generally supposed, by peculiar features, and that these peculiar characteristics may be summed up in the combination of Parliamentary Sovereignty with the Rule of Law.<sup>1</sup>

<sup>1</sup> Compare Intro. pp. cxxxvi *et seq.*, ante; Jennings, *Cabinet Government* (1936), pp. 3-5; *The Law and the Constitution* (2nd ed., 1938), pp. 123 *et seq.* The objections to the contentions advanced in this chapter are that many conventions are unsupported by law, that it is a fallacy to assume that law can be enforced against a Government, that it is difficult to determine in many cases what is the line between law and convention. Jennings concludes that a Government obeys a rule, whether law or convention, because it is concerned with the attitude of the House of Commons to its proposed action.—Ed.

## APPENDIX

### SECTION I

#### ADMINISTRATIVE LAW

##### (1) INTRODUCTION

No part of *The Law of the Constitution* has been so vigorously attacked as that containing the author's claim that the rule of law saved England from what he regarded as the tyranny of administrative law (*droit administratif*) in France. It has been pointed out in the Preface<sup>1</sup> that by administrative law Dicey meant, not the whole body of the law relating to administration, but a single aspect of it, namely, administrative jurisdiction (*contentieux administratif*), to the exclusion even of control by the civil and criminal law.

*Droit administratif*, as it exists in France, is not the sum of the powers possessed or of the functions discharged by the administration; it is rather the sum of the principles which govern the relation between French citizens, as individuals, and the administration as the representative of the State. Here we touch upon the fundamental difference between English and French ideas. In England the powers of the Crown and its servants may from time to time be increased as they may also be diminished. But these powers, whatever they are, must be exercised in accordance with the ordinary common law principles which govern the relation of one Englishman to another.<sup>2</sup>

But Dicey admitted after 1901 that he took his ideas of the nature and existence of administrative law from de Tocqueville. The latter by his own admission<sup>3</sup> knew little

<sup>1</sup> P. xvii and p. 497. *post.*

<sup>2</sup> P. 387, *ante.*

<sup>3</sup> P. 392, *ante*; cited *Œuvres complètes* (14th ed., 1864), vol. vii, p. 66.

or nothing of the actual working of *droit administratif* in his own day. He viewed the system rather as an historian of the *ancien régime*. There is some evidence that Dicey had changed his views towards the end of his life as regards the merits of the French system, but none that he accepted the view prevalent to-day that *contentieux administratif* forms a small but important part of the whole.<sup>1</sup> The argument which appears in the text is that the legalism of the English system of law which is characterised by the unrestricted jurisdiction of the High Court was in marked contrast to the protection which continental systems of law, and the French in particular, afforded to officials by sheltering them from liability in ordinary courts and making them amenable, if at all, to administrative tribunals. Dicey presented a formidable case against the irresponsibility in law of the officers of the administration in France. This he based upon their exemption from process in the ordinary civil courts in respect of official acts.<sup>2</sup> It is to be observed that he passed over the immunities which gave the Crown and the Government Departments the privileged position in English law which they continue to enjoy.

Dicey was historically correct up to a point (1848), but it must be admitted that he failed to interpret the true nature of the *Conseil d'Etat*, the highest administrative court, as it was at the end of the nineteenth century. Even before the reforms of 1872 the *Conseil d'Etat* in its special committee known as the *Comité de Contentieux* had developed into a judicial body which gave judgments rather than advice. The parallel with our Judicial Committee of the Privy Council is in point. For that body, long since a court in all but name, continues to this day to give judgments in the form of advice to His Majesty in full Council. The

<sup>1</sup> For Dicey's later views see Intro. pp. lxxxvi *et seq.*, *ante*, and *Law Quarterly Review*, vol. xvii (1901), pp. 302-318, for his article "Droit Administratif in Modern French Law," especially at p. 308, where he acknowledges that he was misled by the older French writers. "Hence the older authorities, such as Vivien, though of deserved reputation, cannot be relied upon, as the present writer did rely upon them, for giving an accurate picture of the working of *droit administratif* at the end of the 19th century."

<sup>2</sup> See pp. 194 *et seq.*, *ante*.



essential difference between the views held regarding the administrative law of France before and after 1848 was that the writers of the earlier period failed to draw a clear distinction between administrative law and administrative adjudication. A system of administrative law does not depend upon the existence of a separate system of tribunals exercising judicial control over officials in their relations with the private citizen, though there were, as Dicey fully described, historical reasons in France for the separation of civil and administrative courts. Even so it does not follow that persons employed by the State acquire as a result exemption from legal liability.<sup>1</sup>

The protection of the individual against the administration depends less upon the tribunal than, as Professor Borchard has expressed it,<sup>2</sup> "on the *mores* of a particular community as reflected in the political instruments it creates. Starting from varying historical foundations and premises the German, French, English and American systems developed in the beginning of the nineteenth century different forms of control over those who wielded governmental powers." In France the courts as successors of the Parliaments which before 1789 were both courts of justice and administrative bodies were suspect. In England they were regarded as the safeguard against a return to the seventeenth-century despotism of the Crown. Hence the growth of administrative tribunals in the one country and their avoidance in the other.

In order to arrive at a conclusion on the controversy it is necessary to consider—

(i) Whether there (a) existed in 1885 and (b) exists to-day in the United Kingdom<sup>3</sup> administrative law by whatever name disguised.

(ii) The nature of *droit administratif* in France.

<sup>1</sup> Jennings points out that the passage on p. 195 in later editions reads: "are, or have been . . . exempted from the ordinary law of the land."—*The Law and the Constitution* (2nd ed., 1938), p. 210.

<sup>2</sup> *Iowa Law Review*, vol. xviii (1933), "A Symposium upon Administrative Law," at p. 134.

<sup>3</sup> The separate features of Scots law are omitted, but, as nearly all administrative law is contained in statutes of recent date, the differences are not fundamental.

(iii) The liability of governmental organs and their officers in English law.

Before turning to a consideration of these questions the scope of administrative law must be examined. Jèze has defined it as "*l'ensemble des règles relatives aux services publics.*"<sup>1</sup> Hauriou's definition is rather more explicit—"*cette branche du droit public qui règle l'organisation et l'activité à la fois juridique et technique des administrations publiques, y compris l'exercice de leurs prérogatives.*"<sup>2</sup> Jennings uses equally wide terms: "Administrative law is the law relating to the Administration. It determines the organisation, powers and duties of administrative authorities."<sup>3</sup> French writers, influenced by the presence of a strong administrative court for several generations in the *Conseil d'Etat*, have long since reduced the field to a system upon which generalisation has been possible. Anglo-American legal literature has shown emphasis in special directions. In the United States<sup>4</sup> Goodnow was particularly interested in the law of officials, but his interests included remedies and, to a less extent, powers. It is in the field of powers that Freund has excelled. The well-known case book of Professor Frankfurter deals with separation and delegation of powers and judicial review of administrative action.<sup>5</sup> It has been described as the most highly specialised of American books on constitutional law. Frankfurter's description of administrative law shows where his interest has lain—the law covering the fields of legal control exercised by law-administering agencies other than courts and the field of control exercised by courts over such agencies. English writers until recently have been overwhelmingly influenced by Dicey. It is remarkable that so little attention has been paid to the views of his famous Cambridge contemporary, Maitland. They are, in the light of the recent recognition of the breadth of the subject, of the greatest

<sup>1</sup> *Les Principes généraux du Droit administratif* (3rd ed., 1925), p. 1.

<sup>2</sup> *Precis élémentaire de Droit administratif* (14th ed., 1938), p. 14.

<sup>3</sup> Jennings, *op. cit.*, p. 194.

<sup>4</sup> See *Iowa Law Review*, vol. xvii (1933), pp. 233-240.

<sup>5</sup> Frankfurter and Davison, *Cases and other Material on Administrative Law* (1932).

interest, spoken as they were in 1887-88.<sup>1</sup> One of the passages from his lectures will suffice to show the extent of his vision :

I do think it worth our while just to see that there are these vast tracts of modern constitutional law, though we can do little more than barely state their existence. I say of constitutional law, for it seems to me impossible so to define constitutional law that it shall not include the constitution of every organ of government whether it be central or local, whether it be sovereign or subordinate. It must deal not only with the king, the parliament, the privy council, but also with the justices of the peace, the guardians of the poor, the boards of health, the school boards, and again with the constitution of the Treasury, of the Education Department, of the courts of law. Naturally it is with the more exalted parts of the subject that we are chiefly concerned ; they are the more intelligible and the more elementary : but we must not take a part for the whole or suppose that matters are unimportant because we have not yet had time to explore them thoroughly. Year by year the subordinate government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832 : it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.<sup>2</sup>

Nor does he hesitate to speak of administrative law, though his distinction between the fields of constitutional and of administrative law cannot be accepted to-day.<sup>3</sup>

Maitland begins his consideration of the definition of constitutional law by referring to those of Austin and Holland. The former regarded administrative law as determining " the ends and modes to and in which the sovereign powers shall be exercised ; shall be exercised directly by the monarch or sovereign member, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are delegated or committed in

<sup>1</sup> See *Constitutional History of England* (1908), pp. 405-407, 415, 500-501, 533-535. \*

<sup>2</sup> *Op. cit.*, pp. 500-501.

<sup>3</sup> See Jennings, *Principles of Local Government Law* (1931), pp. 30-35.

trust.”<sup>1</sup> There is no need here to follow Austin into his classification of the powers of the sovereign as positive morality and those of his subordinates as positive law. But it is clear that all the functions of the political sovereign were for him embraced by the term, administrative law. This is wider than the accepted scope of the subject to-day, namely, that part of constitutional law which relates to the administration, thereby excluding Parliament and the courts, except so far as the former confers, and the latter control, the exercise of powers by the Administration.

Holland gives administrative law as the second of his six divisions of public law. The first is constitutional law which deals with structure, administrative law being concerned with function. But, as Maitland indicated, Holland's ultimate opinion inclined to the inclusion of the broader rules which regulate function under constitutional law. Thus the royal prerogative was included under constitutional law and excluded from administrative law. It was long after the days of Holland and Maitland that the error of this was pointed out.<sup>2</sup> Even when Port has accurately defined the scope of administrative law as coinciding with administrative powers and duties, he devotes his two chapters on English administrative law to delegated legislation and adjudication by administrative bodies. Two years earlier Robson in his *Justice and Administrative Law* understands by the term the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies. Keir and Lawson in their *Cases in Constitutional Law* devote chapters to the judicial control of public authorities and remedies against the Crown.<sup>3</sup> The index shows that, while a substantial part of the former chapter is devoted to administrative adjudication, no place is found for administrative law or *droit administratif* as a whole. New editions of the older books, such as Anson and Ridges, are even more conservative in their outlook. The former omits all reference to the subject except a short passage on the

<sup>1</sup> Austin, *Jurisprudence* (ed. 1873), vol. i, p. 73.

<sup>2</sup> See Port, *Administrative Law* (1929), ch. i; Jennings, *op. cit.*, pp. 30-35.

<sup>3</sup> 2nd ed. (1933), ch. v and vi.

Ministers' Powers Report, and a still scantier mention of control by prerogative writ.<sup>1</sup> The latest edition of Ridges, like Anson, the work of Professor Keith, states on the first page that it is logically impossible to distinguish administrative from constitutional law, but later in a single paragraph on *droit administratif* in the sense of administrative adjudication is content with a footnote admitting that "this, of course, is only one aspect of administrative law."<sup>2</sup> The preface goes further, "the classical doctrine of the rule of law must now be modified and due recognition accorded to administrative law as an essential part of constitutional law." Notwithstanding this, local government continues to figure in a wholly subordinate position in the same short chapter as the Channel Isles and the Isle of Man. The Report of the Committee on Ministers' Powers was only concerned with the subject as limited by Dr. Port's two chapters. The present writer followed the Ministers' Powers Committee closely, though he warned his readers that public administration did not involve principally legislation or adjudication.<sup>3</sup> He also included a chapter on judicial control of public authorities.

There is no doubt that the influence of Dicey is partly responsible for this attitude to administrative law on the part of English text-book writers. Their acceptance, even in modified form, of his exposition of the rule of law, has not only engendered a misunderstanding of the scope of *droit administratif*, but driven them to explain (and the present writer pleads guilty to this charge) as exceptions to the rule of law, such topics as the immunities of the Crown, the Public Authorities Protection Act, the legislative and judicial powers of officials. But the time has now come to drop any pretence that the law of public administration, by central, local or independent authorities is anything more or less than administrative law in the sense used by Hauriou and Jèze

<sup>1</sup> Vol. II, *The Crown* (4th ed., Keith, 1935).

<sup>2</sup> 6th ed., p. 32.

<sup>3</sup> Wade and Phillips, *Constitutional Law* (2nd ed., 1935), p. 304, and pp. 332 *et seq.* Delegated legislation is not discussed in this Appendix. See Ministers' Powers Report, s. ii; and Willis, *The Parliamentary Powers of the English Government Departments* (1933).



and numerous continental writers.<sup>1</sup> The organisation, the methods, the powers (whether styled administrative, legislative or judicial) and the control by higher administrative or by judicial authority of all public authorities is the ambit of administrative law in the United Kingdom.<sup>2</sup>

## (2) ADMINISTRATIVE LAW IN THE UNITED KINGDOM

Dicey asserted that the words "administrative law" were unknown to English judges and counsel. He would not have denied that the law relating to the Army and the Public Revenue, which he discussed in Part II of this book, belonged to constitutional law. Yet these are branches of law dealing with the organisation and powers of public authorities just as does administrative law in the continental sense. Had he been commenting upon a constitution formulated in a code, he would have found that these topics were dealt with separately from that code. So it is with the constitution of the United Kingdom. The Bill of Rights denies to the Crown a standing army within the realm and the right to tax without the consent of Parliament. The legislature provides by separate enactments for the maintenance, equipment and payment of the military force, as well as providing a substantial volume of statute law relating to taxation, e.g. Customs Consolidation Act, 1876, Income Tax Act, 1918, and successive Finance Acts. The subject-matter of these enactments would under a constitutional code be separated from the constitution itself. With our unwritten constitution there is a branch of public law, part of constitutional law, dealing with the detailed work of administration as well as with fundamentals. The latter in a written constitution are contained in the code. The former is found elsewhere whether in legislation or administrative

<sup>1</sup> *History of the Public Administration in the Administrative Council*, which is the only work of the kind in the literature of the subject. It is a valuable work, but it is not a treatise on administrative law. It is a collection of papers, some of which are of great interest, but it is not a treatise on administrative law.

<sup>2</sup> *See* *Principles of Administrative Law*, 2nd ed., 1911, ch. vi, pp. 101-102, and *Administrative Law*, 2nd ed., 1911, ch. vi, pp. 101-102.

decree. In France this branch of public law is not unlike the civil, criminal and commercial law codified. With us it was contained in Dacey's day in a large number of statutes. To day chaos has given place to a series, as yet incomplete, of codified Acts like the Public Health Act 1936, the Local Government Act 1933, the Housing Act 1936, the National Health Insurance Act 1936, the Unemployment Insurance Act, 1935. Even in 1885 there were on the statute book the then recent Municipal Corporations Act 1882, the Army Act, 1881, the Customs Consolidation Act 1876, the Exchequer and Audit Act 1866, and in particular the Public Health Act, 1875. In addition to public health<sup>1</sup> there was a complete law of highways and of poor law and a rudimentary law of housing and of education.

It is a temptation to argue that public law has altered in character because, with the growth of State activity, delegated legislation and the exercise of judicial functions by administrative bodies have increased. The true view is that public attention was fixed upon these aspects of public law by Dicey's exposition of the rule of law, which itself was founded on an application of the doctrine of the separation of powers, inherited from the balanced constitution of the eighteenth century. Dicey emphasised individual liberty and criticised administrative discretion, but he did not deal with the administrative system as such. Nor did he clearly distinguish between discretion, given to officials by statute and the arbitrary discretion which the Crown of old had claimed.

The nature of administrative law may be made clearer by considering how this branch of constitutional law developed after the Revolution of 1688-1689. The Bill of Rights, with which must be read its counterpart the Act of Settlement, is a statute of major importance: it is testimony of no greater effect than any other statute in that its provisions are subject to repeal by an Act of any succeeding Parliament. Some of its provisions have been so repealed. But it contains a number of statements of constitutional principle which remain to this day, of which the following are a selection.

<sup>1</sup> *See, Public Health, 1936* and *commentary* 145 pages of some point also collected in 1936, *above* from the *Public Health Act* 1936.

*The Bill of Rights, 1689*

That the pretended power of suspending of laws or the execution of laws by regal authority without consent of parliament is illegal.

That the pretended power of dispensing with laws or the execution of laws by regal authority as it hath been assumed and exercised of late is illegal.

That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.

That the levying money for or to the use of the crown by pretence of prerogative without grant of parliament for longer time or in other manner than the same is or shall be granted is illegal.

That the raising or keeping a standing army within the kingdom in time of peace unless it be with consent of parliament is against law.

That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.

That excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

And that for redress of all grievances and for the amending, strengthening and preserving of the laws parliaments ought to be held frequently.

*The Act of Settlement, 1701*

That whosoever shall hereafter come to the possession of this Crown shall join in communion with the Church of England as by law established.

That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war or the defence of any dominions or territories which do not belong to the Crown of England, without consent of parliament.

That after the said limitation shall take effect as aforesaid, judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established, but upon the address of both houses of parliament it may be lawful to remove them.

That no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament.

The Bill of Rights by which the King accepted the claims of Parliament was the only alternative to revolution. It resolved the conflict between the claims of the Stuarts, who had failed to recognise that powers of government were passing into other hands than those of the Sovereign and his court, and the claims of the landed and commercial classes now growing in strength. But as yet the fundamental principles which govern constitutional powers remained undetermined. This solution involved the restriction of prerogative rights. But the prerogative as an instrument of government was not destroyed. The reconciliation of the claims of the common law and Parliament to legal supremacy meant the defeat of the third claimant, the Crown. This was the result of the alliance of Coke and his colleagues of the common law with Parliament. Had the issue been differently decided, our public law would have developed under the prerogative. The later growth of ministerial responsibility to Parliament might have brought the prerogative under political control of the legislature, but there would have been no legal control through the courts. As it was, the prerogative was curtailed, but not destroyed, in 1689. For the future, governmental power could only be enlarged by Parliament; but the prerogative remained effective—chiefly in the hands of the King's Ministers after the accession of George I—in those fields where it still predominates, namely, foreign affairs, patronage, disposition of the armed forces, and, of course, in the summoning and dissolution of Parliament. Prerogatives remained with the Head of the State, but the means for enlarging and for curtailing these prerogatives rested with Parliament. Subsequent events have led to Parliament authorising a volume of public law relating to administration in an ever increasing field. It is this volume of law which constitutes administrative law in the main. For in bulk the volume far exceeds the extent of the remaining administrative functions which fall under the royal prerogative. This development, being achieved by the grant of statutory powers, has enabled the courts by applying the *ultra vires* rule—a comparatively new doctrine—to control administrative activity.

Nor was administration in the eighteenth century solely

a matter of prerogative. The powers given by Parliament to the Commissioners of Customs and Excise attracted the criticisms of Blackstone.<sup>1</sup> Holdsworth recalls that Dr. Johnson's definition of excise nearly drew upon him a prosecution for libel.<sup>2</sup> The Finance Acts of the eighteenth century imposed numerous duties upon officials of the Exchequer. But it is necessary to look beyond what Maitland called the showy parts of the constitution to realise that in England there never has been a complete separation of the administration and the judiciary. In the justice of the peace the two were for centuries inextricably blended. The Court of Chancery has always exercised a wide discretion as to the administration of property. Freed from the control of the Privy Council, which had exercised for a while effective control; especially over the poor law in the period from 1590 to 1640, the justice of the peace exercised more or less autonomously wide administrative powers. This state of affairs continued in rural England right down to Dicey's own time. Maitland wrote somewhat gloomily of the removal of these powers to the new County Councils by the Local Government Act, 1888.<sup>3</sup> He saw virtue in the fact that the judicial discretion exercised on the local bench permeated the numerous ministerial activities of the justices. These unpaid magistrates were the chief administrators of the eighteenth and early nineteenth centuries; they were controlled only by the Court of King's Bench. Suspicion naturally arose when their work was transferred to untried elected bodies with paid officials responsible for the actual work of administration. But the transfer made it clearer that administrative law existed. Ever since the Reform Act, 1832, the creation of innumerable bodies, like the poor law guardians, health boards, highway boards, school boards and burial boards, had pointed this way. These bodies were the successors of the commissioners of sewers, the turnpike trusts, the statutory poor law corporations and the

<sup>1</sup> 4 Bl. Comm., p. 281.

<sup>2</sup> *History of English Law*, vol. x (1938), pp. 419, 454.

<sup>3</sup> *The Shallows and Silences of Real Life*, Collected Papers, vol. i (1911), pp. 467 *et seq.*



improvement commissioners of the eighteenth century.<sup>1</sup> This development, coupled with the burdening of the justices with more and more administrative work, partly by local, partly by general Acts of Parliament, had produced something like administrative chaos by the latter part of the century.

The application of administrative powers and duties involves the exercise of discretion by the administrator, save where there is a single imperative course of action prescribed, such as the slaughter of animals affected by an outbreak of foot-and-mouth disease. Such mandatory duty is rare. Normally the administrator has to choose between two or more possible courses of action. There is no question of illegality attaching to the exercise of discretion by those who are called upon to administer the public services which Parliament has set up. Discretion is not arbitrary in the Stuart sense; the title to exercise it rests upon Acts of Parliament. The function of the courts is confined to the application of the doctrine of *ultra vires*. This is inapplicable to question the validity of an Act of Parliament: but it is effective to control those who misapply the administrative discretion which the Act has given. *Ultra vires* limits the powers of all kinds of corporations. It is because public authorities are mainly statutory corporations that it is applicable to organs of the Administration. By its means powers in excess of statutory authorisation can be limited, and acts which are *prima facie* lawful may be invalidated if they are done by a wrong procedure or for a wrong purpose. Under the last named comes the particular case of abuse of rules of natural justice. This ground for attacking the validity of administrative action was more important before the present practice of giving a statutory right of appeal became common.

The machinery is clumsy—largely through orders (formerly prerogative writs) of mandamus, certiorari and prohibition, or by means of relator actions and actions for injunctions and declarations,—but the last word on the question of legality rests with the courts and not with the administration. Moreover, if a servant of the Crown, or a statutory public authority,

<sup>1</sup> Holdsworth, *History of English Law*, vol. x (1938), pp. 195-220.

does an act which is a crime or a tort at common law, he, or it, is liable. Instances are rare of the liability of local government officers. Apart from the statutory exemptions under the Public Health Acts, plaintiffs are naturally disposed to proceed against the local authority itself rather than its officer;<sup>1</sup> but Dicey's emphasis upon this liability remains important. In the great case of *Mersey Docks and Harbour Board v. Gibbs*<sup>2</sup> the House of Lords held that the negligent performance of a statutory duty was itself tortious as constituting a breach of a duty to take care. Public authorities other than the older Government Departments are nowadays concerned exclusively with statutory duties. This important decision has therefore the effect of imposing upon them a common law liability for breach of duty in the absence of any alternative remedy provided by statute. The result is that, apart from the Departments of the Central Government, which cannot be sued in tort,<sup>3</sup> nor directly for breach of contract, a public authority is liable both for breaches of contract and for tortious acts.<sup>4</sup> The common law remedy may, however, be excluded by implication where, as is usual, the Act creating the statutory duty provides an alternative remedy, e.g. by prescribing a summary penalty. It is also to be remembered that a public authority and its servants enjoy an important measure of protection from their common law liabilities in respect of acts, neglects or defaults in the execution of any Act of Parliament, or of any public duty or authority by reason of the Public Authorities Protection Act, 1893,<sup>5</sup> which is of general application, and under statutory provisions of a similar character applying in special cases.

Administrative law, however, gives to public servants duties and corresponding powers to carry out those duties

<sup>1</sup> For exemptions, see Public Health Acts, 1875, s. 265; 1936, s. 305, and Food and Drugs Act, 1938, s. 94; cf. *Mill v. Hawker* (1875) L.R. 10 Ex. 92.

<sup>2</sup> (1866) L.R. 1 H.L. 93; K. & L. 156.

<sup>3</sup> Except probably the Ministry of Transport. See Ministry of Transport Act, 1919, s. 26, and pp. 533, 534, *post*, where the difficult question of the effect of incorporating a Department is discussed.

<sup>4</sup> See App. sec. i (6) (c), *post*.

<sup>5</sup> For text see App. sec. vi.

which are not possessed by the ordinary citizen. Equality before the law cannot, therefore, mean that there is uniformity of legal obligation for all persons irrespective of their status. Just as private law has created separate status for persons under disabilities, so public law recognises distinctive powers as well as duties in the servants of the State. A passage from Jennings, *The Law and the Constitution*,<sup>1</sup> makes this clear :

What Dicey suggests by equality is that an official is subject to the same rules as an ordinary citizen. But even this is not true. An official known as a collector of taxes has rights which an ordinary person does not possess. A sanitary inspector can enter my house to inspect my drains ; my employer cannot. The Home Secretary can compel me to make up a census return ; my neighbour cannot. A sheriff can summon me to serve on a jury ; my friends cannot. The list could be expanded almost *ad infinitum*. All public officials, and especially public authorities, have powers and therefore rights which are not possessed by other persons. Similarly, they may have special duties. I cannot be compelled to maintain any person who is not a member of my family ; a poor law authority is under a statutory duty to relieve every poor person within its area, and a relieving officer to take the necessary steps to that end. An elementary education authority must provide free elementary education for all children between certain ages. The Minister of Labour is under a duty to provide unemployment relief out of funds vested in him for that purpose. Again a long list of examples could be drawn up.

It is clear, therefore, that by "equality before the law," and "obedience to the law," Dicey was not referring to that part of the law which gives powers to and imposes duties upon public authorities. What he was considering—and subsequent chapters make this clear—was that, if a public officer commits a tort, he will be liable for it in the ordinary civil courts.

When a Lord Chief Justice condemns "the abominable doctrine that, because things are done by officials, therefore some immunity must be extended to them,"<sup>2</sup> he is merely emphasising the view that a public officer who commits a tort can be sued in the High Court. Whatever be the

<sup>1</sup> 2nd ed., 1938, p. 292.

<sup>2</sup> *The Times*, 4 Feb. 1938, reporting the remarks of Lord Hewart, C.J., in *Ludlow v. Shelton*—a case of assault and false imprisonment by two constables.

personal reactions of the individual, be he judge or not, to the extended field of administration, no one can deny that all public officials and authorities, judicial as well as administrative, are possessed of special powers as well as duties, normally created by statute, but in the case of the judges mainly evolved by case-law. The conferment of such legal powers need not involve any immunity from personal wrongdoing. It does not in France, as will be seen: it only does so in England so far (and it is a big exception) as the prerogative immunity of the Crown extends to Crown servants, who are in fact, but not in law, responsible for the acts of their subordinates.

The conclusion thus is that there existed in England, even in 1885, a volume of administrative law which has since increased in bulk. It is nowadays recognised by that name at all events by the academic lawyer, though the hostility of Bench and Bar persists. There are, as incidental to a branch of law which covers both organisation and the exercise of powers and duties, administrative tribunals of considerable variety in addition to the ordinary courts. The Ministers' Powers Committee classified them as follows:

- (1) Specialised courts, such as the Railway and Canal Commission which dates from 1873, and the Special Commissioners of Income Tax in the exercise of their appellate jurisdiction.
- (2) Ministerial Tribunals, courts whose members are appointed for the express purpose of determining justiciable issues in connection with the work of a Government Department, such as a Court of Referees to determine a claim to unemployment insurance benefit which is in issue between an insured person and an insurance officer.
- (3) Ministers as judges in person, such as the Minister of Transport in the exercise of his powers to determine appeals from the Traffic Commissioners.

There are also vested in the bodies charged with administration wide powers of enacting regulations. This function too is but a single aspect of administrative law. Its growth has been criticised largely because of the wide acceptance of Dicey's views. Nor is there, nor need there be, in our system any tribunal separate from the ordinary courts to determine

in the last resort the legality of administrative action. An overhaul of the inefficient machinery of review by prerogative writ was long overdue. It was recently provided by the modifications authorised in the Administration of Justice (Miscellaneous Provisions) Act, 1938, ss. 7-10, which do not, however, apply to the writ of habeas corpus, for reasons which are presumably sentimental and political. We have not, and need not reproduce, the *Conseil d'Etat* and the *Tribunal des Conflits* of the French system. Indeed historical considerations, such as the hatred of the Star Chamber and other conciliar jurisdiction of three centuries ago, may well prevent this albeit logical solution with us, just as in France the historical factor was largely responsible for the creation of separate tribunals. In any case, administrative law is primarily concerned not with judicial control, nor even legislation by delegation, but with administration. Valuable it may be in constitutional theory to allow, for example, an ultimate appeal to the High Court to determine whether or not a class of persons is engaged upon insurable employment within the meaning of the Unemployment Insurance Act, 1935. The operation, however, of the insurance scheme itself is the motive of the legislation. This is a matter primarily for administration. So far as administration calls for the exercise of a judicial discretion, it is only excess or abuse of that discretion which is controllable by a court of law. It is indeed the same with the judicial organs. They are empowered to administer the law without interference, subject only to an appeal in the case of lower courts to a higher court. They are only subject to interference in the exercise of their judicial discretion if their jurisdiction be exceeded or abused.

### (3) ATTITUDE OF THE PUBLIC TOWARDS ADMINISTRATIVE LAW

That the fear of bureaucracy, in the sense of the rule of the official equipped with wide discretionary power, is still present to-day in the minds of many Englishmen is apparent. It may be said to take two forms :



(1) The resentment on the part of the owner of property (particularly the owner or occupier of land) and his professional advisers who are affected by the State regulation which Parliament has imposed. This regulation may be administered by a Department of the Central Government, as with taxation or road transport; by an independent central organisation, such as one of the Agricultural Marketing Boards; by a local elected authority, as with town and country planning, or restriction of ribbon development; or directly through the courts or by arbitration, as with rent restriction and compensation of tenants by their landlords. In the case of the first two methods the individual deals with an official who is not only remote and unknown to his opponent, but is also himself tied down by general regulations which prevent him from compromising a dispute by the method of give and take. Elasticity in dealings between individuals, or their agents on their behalf, cannot readily be imparted into relations between an individual and the State, whose client is the public. It is difficult to bargain when one party is so handicapped. Yet the spirit of compromise and willingness to meet individual difficulties has done much in the past to make workable, for example, our system of agriculture on the landlord and tenant system, even if it has at times permitted powerful individuals to exploit their resources to the detriment of others. Our land transfer ought logically to be by registered title. But the anomalies of conveyancing by the cumbrous method of proof of private titles are tolerated partly because of the fear of rigidity which a State register may involve, notwithstanding the successful working of compulsory registration in the County of London for forty years past.

In the case of regulation through the local authority and its paid officers the objection of remoteness and lack of local knowledge ought not to be a valid one; but to many people an official is remote even if his office is near by, and he is seldom credited with a real understanding of the point of view of his opponent. In some cases, too, the local authority itself is rightly regarded as incompetent, biassed or even corrupt. The inefficiency of some of the smaller local authorities (District Councils) has led some to advocate a

diminution of their powers, which have been increasing of late years, despite the transfer of their highway functions to the County Councils. They remain, however, the principal public health and housing bodies and as such are liable to come into conflict with property owners. So far as these bodies exercise under their statutory powers a virtually uncontrolled discretion in their dealings with owners of property, large or small, they come under suspicion. Nor is an Englishman likely to derive much comfort from the assurance, which Dicey so confidentially gave him, that he is far better off than his neighbour across the Channel in his power to punish the illegal acts of an official. Only slowly and painfully can the advent of the collectivist State find acceptance with the individual property owner. Of late years the pace of the advance has been rapid and has been accompanied by additional burdens in the form of taxation. The official, like the lawyer whose work he largely creates, is an unpopular, if inevitable, feature of modern society.

(2) More important to the majority is the relationship between those who administer the public social services and the beneficiaries under those services. It is still true that the public health services, particularly the hospital and other medical facilities, do not reach by any means all the members of the public for whom they were designed. Social workers, paid or unpaid, can give many instances of refusal to supply information on the printed form whereby the benefit of some public service may be obtained by a person whom it is designed to assist. In the educational services the closing of the village school or the transport of elder children to a modern and often model larger school in a neighbouring market town or larger village rouses fierce denunciation of the local education authority from parent as well as from parson, employer, and leaders of village organisations for young people. Even the council house is attacked. The chance of remission of rent by a landlord in hard times is not always compensated for by a tenancy (usually at a higher rent) the terms of which are rigidly enforced by a housing official on behalf of a district council, despite the improved accommodation provided.

What, it may be asked, has all this to do with the law of the constitution? Strictly speaking, it is irrelevant; but any explanation of administrative law which fails to take account of the reaction of the people to State provision for their welfare would be incomplete. On the whole, there is no doubt that administrative law has provided services which are essential and well received. The cry is for more and not for less public services and State regulation. But there is an inarticulate body of opinion, by no means confined to the richer classes of the community, which resents State interference — partly from hatred of officialism and its methods, partly from fear of fascism or communism. Public services have become the recognised means of redistributing the national income, but they call for sacrifices not merely of wealth by the taxpayer, but of independence by the beneficiary. It is unlikely that the near future will see any change in the policy of Governments in this regard. Indeed the chances are that regulation and State tutelage will increase, and with these the number and powers of officials. There is all the more need to preserve and to increase popular control. This can be achieved not merely through a democratic legislature at the centre and an alert and intelligent local council, but through increasing association of the public with administration in all its aspects. The value of the agricultural marketing schemes, imperfect and in many ways open to objection though they be, lies in the fact that they have been adopted by those most directly concerned with their working. If bureaucracy is to be controlled, the future lies with increasing the opportunities of the public to temper the rule of the official. The system of administration by committee, the basis of modern local government, is one of the healthiest features of to-day. For it affords a means of imposing a more or less personal responsibility to its members on the officials of the particular service administered by the committee. By improving the efficiency of this system lies salvation, *e.g.* by co-opting teachers and parents, as such, on every sub-committee of a local education authority. In the sphere of central government something has been achieved by the practice, and in some few cases the practice

is made compulsory by law, of taking into prior consultation organised interests most nearly concerned with the content of general regulations which Parliament has empowered a Department to promulgate.<sup>1</sup> In short, any device to secure more directly government by the consent of the governed rather than by rule of the expert is to be commended, to those who share Dicey's ideal of democracy and distrust and dislike of the expert.<sup>2</sup>

In another part of this Appendix is discussed the need for preserving liberty of person and of opinion as essential to a democracy. The dangers of the police State are not less than interference with liberty of property as the price of State regulation of social and economic life for benevolent ends. They are infinitely greater and serve to unite persons of widely different political outlook who, though not for the same reasons, are anxious to preserve those liberties which the common law has hitherto championed without menace from Parliament.

#### (4) DROIT ADMINISTRATIF IN FRANCE<sup>3</sup>

*Droit administratif* can be defined in France as the body of rules which determine the organisation and the duties of public administration, and which regulate the relations of the administrative authorities towards the citizens of the State.

Men living in society have a number of collective needs, and it is the duty of the State in any country to provide for the satisfaction of those needs, or, at least, to see that they are satisfied. The citizens of every State need national security; they demand a certain amount of education; they need roads and railways and post offices and hospitals. The State will take such necessities into account, to a different extent according to times and countries, and it will see that the wishes of the citizens are fulfilled. To that end there will be State officials with diverse qualifications -as, for example,

<sup>1</sup> See Intro. pp. xlii, xliii, *ante*.

<sup>2</sup> See Intro. p. lxxxviii, *ante*.

<sup>3</sup> Contributed by René David, Professor of Law in the University of Grenoble.

prefects, mayors, teachers, collectors of taxes, inspectors of labour, police—whose duty it will be, either to further the application of the law and to apply the law to every particular situation, or to lay down rulings of a more general character under the supervision of, and within the limits fixed by, Parliament. The first function of *droit administratif* and the first series of rules included in *droit administratif* are to determine what types of State officials and of administrative authorities are maintained, how they are appointed, what their status is, what salary they receive, how they can be dismissed, when they shall cease their duties, and in general what these duties are.

The second function of *droit administratif* and the second series of rules included therein are to determine in what manner public services will operate to meet the needs of citizens. There will be cases where satisfaction will be given to the needs of citizens by the State officials themselves. State officials will take in charge a public service; they will collect and deliver letters, build and run hospitals, provide for a police force and for a navy. In other cases the State will only assume a task of supervision, of policing. It will exercise control over the formation or the working of certain associations or societies; it will fix the prices for necessary goods. In other cases finally *droit administratif* will only put aside some principles of private law, in order to help a utility service, provided by a private organisation. It will allow, for instance, a public utility corporation to deprive an owner of land of his property. In all cases the scope of *droit administratif* is to provide for rules aiming at satisfying or assisting the satisfaction of particular needs of citizens which the State is anxious to see fulfilled.

The provisions of *droit administratif* and of *droit civil* are equally binding. A State official cannot be appointed nor can he get promotion or be dismissed contrary to the provisions of the law. An administrative authority cannot act *ultra vires* or without the formalities required by the law. The freedom of a citizen cannot be hampered nor his rights infringed in a manner unauthorised by the law. There is no doubt about this; the prerogative of administration is not absolute, and



administrative authorities do not enjoy arbitrary powers for the accomplishment of their duties.

There must exist, therefore, provisions for the case when an administrative authority has been acting contrary to the law, whether the illegality be a matter of form or of substance. What remedies will be put at the disposal of a citizen whose interest has been thus affected, and to what authority will he have to resort? There are two ways of dealing with the question. The first is to leave the determination of the issue to the jurisdiction of the ordinary courts of justice. It suffices that there should be the means to determine when the act of an administrative authority can be set aside and, occasionally, when a State official or his employer, the State, is liable in tort for an act committed by him in the course of his duties. The second way of dealing with the question is to exclude the application of the common law rules and the jurisdiction of the ordinary courts, and to have the whole matter regulated by special rules and adjudicated by special courts, *i.e.* by administrative tribunals.

The second of these solutions, for historical reasons, has been preferred and adopted in France, in order to avoid an encroachment by the courts on the dealings of administrative authorities and an intrusion of the judges into the business of administration. There is, therefore, in France, included in *droit administratif* a third series of rules, the scope of which is to give effect, and to attach a sanction, to the two former series of rules. This third series of rules relating to administrative adjudication, *contentieux administratif*, is the only one to which Professor Dicey has dedicated his study; but it is by no means the only content of *droit administratif* according to the views of French legal writers.

If an administrative authority, by its act, inflicts an injury upon a citizen, and if the act thus committed is a breach of the law, an action will lie on principle before an administrative tribunal, and not before an ordinary court (*tribunal civil*). There may also be the possibility of an appeal for redress on his part to an administrative authority superior in the hierarchy to the one wherefrom the act emanated. There are many administrative tribunals in

France: the *Conseil d'Etat*, *Conseil interdépartemental de Préfecture*, *Cour des Comptes*, *Conseil de l'Instruction Publique*, *Conseils Militaires de Révision*. It will be enough here to give a brief account of the *Conseil d'Etat*, which is the most important of these tribunals, and normally competent for administrative litigation.

The *Conseil d'Etat*, the origin of which must be sought in the old *Conseil du Roi* of ancient France, is endowed with an extensive jurisdiction. It takes part, or may take part, in the framing of the laws enacted by Parliament; it necessarily plays a part in the elaboration of the "*règlements d'administration publique*," which are orders made by the *Conseil d'Etat* by delegation of the powers of Parliament, in order to ensure the application of a law when the legislature has only enacted the principle of such law. The *Conseil d'Etat* is also endowed with powers of strict administration; its advice must be taken, and in some cases must be followed, before some steps are taken in administrative matters, *e.g.* before some public works are authorised, or before a municipal body may accept a gift, or before a corporation is declared a public utility. It is, finally, also a tribunal and, more particularly, it is the ordinary court which must be resorted to when a person complains that he has suffered injury by reason of the violation of a rule of *droit administratif*.

The guarantee for a good administration of justice, and especially the guarantee for impartial and independent judges, is to be found no less in the *Conseil d'Etat* than it is in the ordinary civil courts. Most of the members of the *Conseil d'Etat* who are concerned with the judicial business of that body have been appointed after an examination which corresponds closely to the examination upon the results of which judges of the ordinary courts are appointed, except that it is considered much more difficult. The other members of the *Conseil*, who are concerned with the judicial side of its business, have formerly held appointments as officials of the State in some other branch of the Administration, but they are no longer connected with such branch and will never be connected with it again. The Minister of Justice (the Keeper of the Seals), who is a politician, is no

longer allowed to act as a judge and to take part in the contentious business of the *Conseil d'Etat*, although he is still the president of that body ; and the same is true of the other members (*conseillers d'Etat en service extraordinaire*), who are at the same time members of the *Conseil* and active members of some other branch of the Administration. The parties to an action have therefore the same assurance of the independence of their judges, whoever these judges may be, whether members of the *Conseil d'Etat* or judges of the ordinary courts.

The assurance is so much stronger, when the action is brought before the *Conseil d'Etat*, because the rules of promotion for the members are somewhat more definite and less arbitrary than the corresponding rules for the promotion of ordinary judges. It is true, however, that a member of the *Conseil d'Etat* may be removed from office, while judges enjoy the privilege of being irremovable ; but the difference is in fact purely theoretical : no member has been removed since 1879. Nor would public opinion admit nowadays that a member should be removed on the particular ground of his activity in a judicial capacity in the *Conseil*. Thus, as a matter of fact, the independence of the members of the *Conseil d'Etat* is complete, and nobody would dare to challenge it. Its jurisdiction is in practice beneficial to the citizens, who can obtain there justice at less cost and more expeditiously than in the ordinary courts of law. In fact an action brought by a citizen against the State will stand a better chance of success if it is within the jurisdiction of the *Conseil d'Etat* than if it is within the jurisdiction of the ordinary courts of justice.

Such comparison is possible because some causes of action relating to matters of administration, which ought therefore to be brought before an administrative tribunal, must, in accordance with special provisions of the law, be brought before the ordinary courts. There are many cases where an action in an administrative matter will be determined by an ordinary court ; such as cases of requisition or expropriation of land, cases arising from indirect taxation, actions against the Post Office authorities, actions brought against the State

or a municipal body after riots, actions for damages brought against a State official who has incurred a personal liability by reason of his personal misconduct (*faute personnelle*) as opposed to *faute de service*. The latter means injurious conduct in the furtherance of his duties, which only gives rise to a State liability, determined in an action before an administrative tribunal. The jurisdiction of the ordinary courts has been admitted in such cases for various reasons, either in the past by reason of mistrust for administrative tribunals, or in more recent times by reason of convenience, in order not to compel the parties to an action to go to Paris to bring their action there before the *Conseil d'Etat*.

On the other hand, it must be noted that the ordinary courts are always competent to entertain any proceedings of a criminal nature; and on this occasion they will have to examine the validity of orders issued by administrative authorities, if a citizen is accused of a breach of such orders. The ordinary courts cannot, it is true, annul an order issued by the Administration, but they will acquit a citizen who has acted contrary to such order if they deem that the authority issuing the order has acted beyond its powers or without the formalities required by the law and that the order is therefore illegal (cf. *Code Pénal*, Article 471, 50').

The general principle, however, is as follows: an ordinary court will not entertain an action in which a citizen complains that a rule of *droit administratif* has been violated; such action, if any is open to him, will therefore have to be brought before an administrative tribunal, that is, as a rule, before the *Conseil d'Etat*, which in this capacity functions as a court of justice, its decisions having the true nature of judgments. If, contrary to that principle, an action is brought before an ordinary court, the court of its own motion will refuse to examine it; and if it does not, a special procedure, the procedure of conflict, will oblige the court to keep within the limits of its jurisdiction. The supreme court established by law to give decisions in such matters is the *Tribunal des Conflits*, and the main rules of competence for the determination of the respective jurisdiction of ordinary courts and of administrative tribunals have been fixed by it in well-known

cases: decisions of February 8th, 1873, *In re Blanco* (Dalloz, 1873, 3. 17; Sirey, 1873, 2. 153), and of February 29th, 1908, *In re Feutry* (Dalloz, 1908, 3. 49; Sirey, 1908, 3. 97); and see *Conseil d'Etat*, February 6th, 1903, *In re Terrier* (Dalloz, 1904, 3. 65; Sirey, 1903, 3. 25).

The *Tribunal des Conflits* consists of an equal number of ordinary judges of the *Cour de Cassation* and of administrative judges of the *Conseil d'Etat*. But its President is the Minister of Justice (the Keeper of the Seals), who can therefore exercise a casting vote. This addition of a politician to the judges has been justly criticised and will probably disappear. It is at present a flaw in the judicial constitution of France, but a flaw of small importance, as is evidenced by the fact that the casting vote of the President has operated but three times since the institution of the *Tribunal des Conflits* in 1872.

Whenever a case is within the jurisdiction of the *Conseil d'Etat*, the judgment of that body will not be given by reference to the principles of the *droit civil*, but the court will apply a system of its own, and it will apply the specific rules of *droit administratif*. There is no code of *droit administratif*, as there is a *Code Civil*, and the rules of *droit administratif* are mainly judge-made law, although the *Conseil d'Etat* (as with all courts in France) is not bound by precedent. The rules of the *Code Civil*, as a matter of fact, will normally be applied, but only by way of analogy and by reason of their accordance with natural justice. The *Conseil d'Etat*, however, will not hesitate to depart on various points from these rules, either to facilitate the machinery of administration and to prevent an interruption in a public service, or merely to allow natural justice to be done in a case better than it would be done by a strict application of the rules of *droit civil*.

The *Conseil d'Etat* has in this way elaborated doctrines of its own; but it is essential to note that the reason why the doctrines of *droit civil* have been eventually abandoned has not been in order to justify the arbitrary acts of the Administration, nor to narrow the rights of the citizens. On the contrary, the special rules elaborated by the *Conseil d'Etat*



have been in most cases more beneficial to the citizens than the rules of *droit civil* would have been. The decisions of the *Conseil* have frequently given rise to doctrines altering and improving the *droit civil* which have been subsequently admitted by the ordinary courts or introduced into the *droit civil* by Parliament.

In the province of the law of torts (*responsabilité délictuelle*), for instance, it may well be doubted whether the great evolution which has taken place in the last forty years in the *droit civil* would have taken place, but for the example given by the decisions of the *Conseil d'Etat*, founded on the dictates of natural justice. In the province of the law of contract, the *Conseil* has admitted a doctrine of the revision of contracts that goes far beyond the doctrine of impossibility of performance which obtains in the *droit civil*. The citizen who has made a contract with an administrative authority is thus much better protected than the citizen who has made a contract with another private individual. The cases where a citizen will obtain redress from the State or an administrative authority in the case of the wrongful act of an agent are numerous, and illustrate the proposition that the jurisdiction of the *Conseil d'Etat*, an administrative tribunal, is not prejudicial to the victim of such wrongful act.

The same observation can be made respecting the annulment by the *Conseil* of acts, decrees or orders, made by an administrative authority contrary to the law. The members of the *Conseil d'Etat* have been, or may still be, engaged (within the *Conseil* itself) in administrative business. This fact makes them perhaps more apt than the judges of ordinary courts to calculate the consequences of their decisions, and perhaps makes these decisions more acceptable to, and more difficult to be challenged by, the Administration. The judges of the ordinary courts, had they been competent in the matter, would most probably have been more timid in their criticism of the acts of administrative authorities than the *Conseil d'Etat*. This is unanimously admitted by French lawyers and proved by way of comparison in the cases where the ordinary courts have an exceptional jurisdiction in administrative matters.

There may be cited, in conclusion, some of the decisions of the *Conseil d'Etat*, which illustrate the liberal character of that tribunal and the efficiency with which the rights of the citizens are protected by it in France against any possible encroachment of the Administration.

*Conseil d'Etat*, March 30th, 1916, *In re Compagnie Générale d'Eclairage de Bordeaux* (Dalloz, 1916, 3. 25; Sirey, 1916, 3. 17): a company had entered into a contract with the town council of Bordeaux, and was obliged by virtue of this contract to supply gas to the inhabitants of the town for thirty years at a given price per cubic metre. The contract price had been determined by reference to the price of coal, which was at the time of the contract, in 1904, 23 francs per ton. In 1915 a ton of coal cost 60 francs. The Company brought an action before the *Conseil d'Etat* asking for the revision of the contract and for an indemnity to recover their extra expenses due to the increase in the price of coal. The action, had it been brought before an ordinary court and had the principles of *droit civil* applied to the determination of the case, would certainly have failed. The *Conseil d'Etat*, however, allowed the plaintiff an indemnity, on the ground that a public interest would have been affected, had the activity of the company been interrupted by reason of liquidation for insolvency.

*Conseil d'Etat*, November 30th, 1923, *In re Courtéas* (Dalloz, 1923, 3. 59; Sirey, 1923, 3. 57): the plaintiff was the owner of a large piece of land in South Tunisia, and his property had been wrongfully occupied by natives, who considered it as being their own. The title of the plaintiff had been established by a decision of the court and was therefore unimpeachable, but the administrative authorities of Tunisia were afraid that the enforcement of the decision of the court would provoke a rebellion of the natives, and it refused to enforce the judgment in favour of the plaintiff. The plaintiff brought an action for damages before the *Conseil d'Etat*, alleging that the Administration had not carried out its duties towards him. The *Conseil* allowed the plaintiff damages.

*Conseil d'Etat*, March 29th, 1901, *In re Casanova* (Dalloz,

1902, 3. 33 ; Sirey, 1901, 3. 73) : a parish council decided to pay an annual salary to a physician, who was to give free medical assistance to all inhabitants of the parish in consideration of that salary. A ratepayer of the parish and two physicians brought an action before the *Conseil d'Etat* to have this decision annulled. The action was successful, for the *Conseil* considered that the parish council had acted beyond its duty, which was to provide free medical assistance to the poor inhabitants of the parish.

*Conseil d'Etat*, May 5th, 1899, *In re Thos. Cook and Son* (Dalloz, 1900, 3. 81 ; Sirey, 1901, 3. 118) : the mayor of Nice had issued an order making charabancs subject to the same regulations in Nice as cabs. At the request of the plaintiffs the order was declared void. It appeared that it had been made by the mayor for a revenue purpose, while the powers of a mayor to issue regulations concerning traffic in the town could only be used for an object connected with the convenience and safety of the public.

*Literature.*—The most up-to-date text-books on *droit administratif* are Hauriou, *Précis de droit administratif* ; and Waline, *Manuel élémentaire de droit administratif*. The latter one is perhaps easier for an English lawyer to consult.

The third part of the Reports of Dalloz and of Sirey and the Reports of Lebon contain exclusively decisions of the *Conseil d'Etat*.

An article by James W. Garner, "La conception anglo-américaine du droit administratif" (*Mélanges Hauriou*, pp. 337-385), contains an interesting account of administrative adjudication in France with a comparison of the corresponding principles in England.

The following table of the contents of the former of these text-books supplements the foregoing article in giving a conspectus of the whole subject as it is studied in France.

HAURIOU, *Précis Élémentaire de Droit  
Administratif*

(14th ed., 1938)

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(5) JURISDICTION OF THE HIGH COURT OF JUSTICE  
OVER ADMINISTRATIVE DISPUTES

The extent of the jurisdiction of the High Court (the ordinary courts, as Dicey understood them) in relation to administrative law may be summarised as follows:

(i) To determine appeals from the administrative judge or tribunal on points of law or to adjudicate in the first instance administrative disputes of a purely judicial character under special statutory provisions, *e.g.* Housing Act, 1936, Sch. II (clearance and compulsory purchase orders), Income Tax Act, 1918 (appeals from General or Special Commissioners). Appeals of this character do not necessarily lie to the courts. Parliament sometimes provides a special administrative tribunal to determine appeals, *e.g.* courts of referees for unemployment insurance claims, or directs determination by an administrative authority, *e.g.* the Minister of Health in a dispute between an insured person and an insurance committee or between two approved societies under the national health insurance services.

The Report of the Committee on Ministers' Powers emphasised that there is a distinction between powers of judicial and quasi-judicial decision. It assigned the latter, which are determined by reference to administrative policy, to ministerial tribunals, but regarded the former as normally, but not invariably, more suitable for determination by courts of law.<sup>1</sup>

(ii) To restrain excesses of jurisdiction and abuse of power to make judicial or quasi-judicial decision and to compel the performance of a specific and imperative duty of

<sup>1</sup> See Ministers' Powers Report (Cmd. 4060, 1932), pp. 73-75, 92-98. For criticisms see Jennings, *The Law and the Constitution* (2nd ed., 1938), App. ii; Wade and Phillips, *Constitutional Law* (2nd ed., 1935), p. 320.



a public character. This jurisdiction is enforced chiefly by means of orders, a simplified procedure on the lines of the prerogative writs, but also by ordinary legal process by original writ for an injunction, and of late in an increasing number of cases by declaratory judgment.

(iii) To decide personal actions for tort or breach of contract and to adjudicate petitions of right where an illegality of a character ordinarily remediable by damages is alleged. Not merely is this jurisdiction deficient on account of the prerogative immunities of the Crown, but administrative excesses are not necessarily or normally capable of redress by common law or equitable remedies derived from a system which has at its basis the protection of the individual rather than the performance of public duties.

(iv) To punish crimes of officials. This best illustrates Dicey's meaning of equality before the law. For administrative law, like any other branch of law, does not legalise crime; indeed, it often provides more severe penalties, such as loss of office, which are additional to those inflicted by the criminal courts.

No attention is paid in this summary to the various administrative functions of the High Court, particularly in the Chancery Division, in relation to the administration of the estates of deceased persons, bankruptcy and the winding-up of companies incorporated under the Companies Act, 1929. There is a separate branch of the High Court—the Management and Administration Department—which supervises the administration of the estates of persons of unsound mind or other disabling infirmity.

Nor is it desired to explain the details of the control exercised by administrative authorities. The purpose of these notes is to set out the principles upon which the ordinary courts exercise judicial control. The essential difference between judicial and administrative control is that the former is only exercised if it is invoked by a litigant, be it an individual who is aggrieved by administrative action, or one authority disputing with another: administrative control is exercised apart from the request or intervention of an aggrieved party. It is therefore continuous, whereas

judicial control is partial and intermittent, depending entirely upon the accident of litigation. These notes deal only with judicial control exercised by the ordinary courts over matters which in France would fall to be determined in the administrative courts except so far as they relate to the personal liability of an official for *faute personnelle* (error or illegality), as distinct from the liability of the State for its servant's *faute* which is assessed by an administrative court.

(6) LEGAL LIABILITIES OF GOVERNMENTAL ORGANS AND THEIR OFFICERS AND SERVANTS IN ENGLISH LAW<sup>1</sup>

*Introductory.*—The object of the statement which follows is to indicate the scope of legal liability of governmental organs and their agents and thus to show the extent of control over administration exercised by the courts. A large part of this subject is omitted by Dicey, who, although he was solely concerned to explain the limitation of administrative power by the criminal law and the law of torts, did not, except in a very short note, discuss proceedings against the Crown, nor did he refer at all to local government law, as such. The preceding note<sup>2</sup> on *droit administratif* contributed by Professor René David of the University of Grenoble, a comparative lawyer who has studied English law in its own home, will afford a valuable comparison. The reader will thus be able to judge for himself whether the official enjoys greater immunity in English or French law. No account is taken here of the methods of determining rights by such administrative authorities or tribunals as have been set up by Parliament. For this subject reference should be made to the Report of the Committee on Ministers' Powers,<sup>3</sup> and to the Memoranda supplied to the Committee by the Government Departments (Minutes of Evidence, vol. i), which give an

<sup>1</sup> No account is taken here of the special features of Scots Law. Much of the administrative law of Scotland is contained in separate Acts of Parliament. The law relating to Crown proceedings is in some respects more favourable to the subject.

<sup>2</sup> Pp. 495-506, *ante*.

<sup>3</sup> Cmd. 4060, 1932, s. iii.

exhaustive list of their powers of judicial and quasi-judicial decision. To these must be added any new powers created since 1931 and all similar powers possessed by bodies which are not Departments of the Central Government, such as the Railway and Canal Commission. It is to these tribunals that the greater part of judicial proceedings (*contentieux administratif*) falls to-day, but they are not concerned with the control of administrative officials for excess or abuse of power, so much as with the actual work of administration. Generally speaking, they are, as the Committee's Report shows, subject to the overriding jurisdiction of the courts so far as excess of power is in issue. It is as well to emphasise that the prominence given to this subject by this statement of legal liability must not be taken as meaning that judicial proceedings, like delegated legislation, form anything more than a small but important part of English administrative law. Moreover it is only a small fraction of the judicial side of administrative law which is concerned with wrongful exercise of power. The major part deals with disputes between the administration and the subject arising out of the lawful exercise of the former's powers. Administrative law is mainly concerned with the actual working of the governmental machine and the greater part of it has never come before the courts for interpretation.

The statement falls under four headings, dealing with: (A) Procedure by prerogative writ, as it was until the enactment of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which substituted a simpler procedure by order. This enables the courts to exercise judicial control where there is no common law or equitable claim for relief by an injured party who seeks damages or consequential relief as an individual. Liability is discussed in relation to: (B) the Central Government, (C) Local Authorities, (D) Independent Authorities. In each case the liability of individual officers is included. The subjects of (1) *ultra vires*, (2) injunctions, (3) declaratory judgments, are mentioned under (C) Local Authorities, purely as a matter of convenience and not because they apply exclusively to that type of authority. There are some omissions, for no attempt has been made to

catalogue examples of the cases where there is a statutory right of appeal to the courts.

(A) *Remedies by Judicial Order*

It will be convenient first to explain the remedies afforded until recently by the writs of mandamus, prohibition and certiorari, and now by the simplified procedure of judicial orders bearing the same titles. Just as the writ of habeas corpus safeguarded the liberty of the subject's person, and that of quo warranto prevented the unlawful assumption of public office, so prohibition and certiorari were available in particular to protect the property interests of individuals from unlawful interference by a public authority (including in some cases Government Departments) and mandamus to compel the performance of a public duty.

Most books on constitutional law give full attention only to the writ of habeas corpus, but the development of administrative law compels consideration of the other prerogative writs which are of equal force and hitherto have been obtainable by a similar cumbersome process as the first-named writ. The new procedure of review by judicial order introduced by the Administration of Justice (Miscellaneous Provisions) Act, 1938, does not alter the principles of law upon which prerogative writs were issued. Indeed for reasons of policy which are mainly sentimental the Act leaves untouched habeas corpus procedure. Informations in the nature of quo warranto are abolished and the remedy of injunction substituted; they had already disappeared as regards local government offices.<sup>1</sup> A feature of these orders is that they lie against servants of the Crown (in certain limited circumstances), local authorities, independent public bodies, as well as inferior courts of every description. They are part of the machinery of administrative control which the old court of King's Bench derived from the Curia Regis, though later the Council retained and exercised in Tudor days its own control more effectively than did the King's Bench.

<sup>1</sup> Local Government Act, 1933, s. 84.

It was Dicey's opinion that the writ of habeas corpus Habeas corpus. invested the judges "in truth, though not in name, with the means of hampering or supervising the whole administrative action of the Government, and of at once putting a veto upon any proceeding not authorised by the law."<sup>1</sup> That this is true to-day so far as preventing the Government from dealing with inconvenient subjects by unlawful arrest is illustrated by *Secretary of State for Home Affairs v. O'Brien*.<sup>2</sup> The sequel to this case resulted in large sums being paid in compensation for their illegal deportation to a number of sympathisers with the cause of Irish Republicanism. It is true that a Government by command of its parliamentary majority can always escape the consequences of its invasion of the liberty of the subject by legalising past illegalities by an Indemnity Act. But public opinion would be likely to restrain a Government from taking such a course, so deep-rooted is the tradition of personal liberty. At all events no Indemnity Act was passed to relieve the taxpayer from the burden of paying compensation for the illegal acts in the case cited which were alleged to have been authorised by the Home Secretary after consultation with the Attorney-General. But the delegation to the Administration by Parliament of power to suspend the writ of habeas corpus which was granted by the Defence of the Realm Acts, 1914-1915, shows that the safeguard is really at the mercy of the Government of the day. Clearly it would only be the plea of an emergency comparable with that of 1914 which would justify the grant of such a power, but the precedent does much to qualify Dicey's assertion. His examples<sup>3</sup> of the suspension of habeas corpus for particular offences and of arming of the Administration with powers under the Irish Coercion Acts of the latter part of the last century are instances which fall far short of the powers conferred by the Defence of the Realm Acts.<sup>4</sup> Even so, it was necessary to pass an Indemnity

<sup>1</sup> See p. 222, *ante*.

<sup>2</sup> [1923] A.C. 603; K. & L. 178.

<sup>3</sup> See pp. 228-232.

<sup>4</sup> Cf. the statement on p. 202, *ante*, that suspension of habeas corpus only related to one particular remedy for the protection of personal freedom.

Act in 1920, a step which was rightly regarded by Dicey as a necessary sequel to every suspension.

Prohibition  
and  
Certiorari.

But the courts are able by orders of prohibition and certiorari "to put a veto upon administrative action which is not authorised by law," and to some extent to hamper and supervise. So far as the protection of personal liberty is concerned they are seldom invoked, because habeas corpus proceedings raise the general issue of the illegality of detention, whereas certiorari is confined to reviewing particular judicial (in the broadest sense) proceedings and prohibition similarly lies to restrain excess of jurisdiction by a court or body acting judicially. But modern administrative methods seldom lead to unlawful interference with the person. They are, on the other hand, expressly designed for the regulation of private interests, particularly proprietary interests. In this respect they are the antithesis of the common law which seeks to protect the individual proprietor in the enjoyment of his land and goods. There is also this difference to note. Parliament has not hitherto, as with habeas corpus, been asked to suspend the operation of these orders, though certain statutes have attempted to exclude the controlling jurisdiction of the courts by a formula like the "conclusive evidence" clause.<sup>1</sup> A provision in an Act which makes confirmation by the Minister conclusive evidence of compliance with the statute and states that the validity of a statutory order shall not be questioned in any legal proceedings whatever has not so far proved capable of review by the courts.<sup>2</sup> It would perhaps be rash to prophesy that even this formula is watertight. At all events it is now the law that an order which is authorised by an enactment to have effect as if enacted in the Act may be held *ultra vires* in certiorari proceedings if the court considers that such an order is inconsistent with the provisions of the Act which authorised it.<sup>3</sup> Thus if an Act authorised the making of orders for acquiring land for a specific purpose, such as road widening, an order which purported to acquire land

<sup>1</sup> See Willis, *Parliamentary Powers of English Government Departments* (1933), p. 101.

<sup>2</sup> *Ex parte Ringer* (1909) 27 T.L.R. 718.

<sup>3</sup> *Minister of Health v. The King* [1931] A.C. 494.



for erecting a municipal hospital could be quashed, even if it was expressly enacted that the order should have effect as if enacted in the Act.

Apart, then, from these exceptional cases orders of certiorari and prohibition are available to determine questions of excess of power. They are equally efficacious to raise the issue of abuse of process, *e.g.* bias, or other abuse of the rules of natural justice.<sup>1</sup> In this sphere their application has, however, been narrowed. For a procedure prescribed by Parliament, as is the usual rule, cannot be held to offend any principle of natural justice. The remedies have, moreover, hitherto been encumbered with procedural technicalities which make them compare unfavourably with the somewhat similar function performed by the *Conseil d'Etat* in affording *recours pour excès de pouvoir* as well as a remedy on account of *détournement de pouvoir*.

The primary purpose of the order of prohibition is prevention by a higher court (the King's Bench Division of the High Court) of excess of jurisdiction or an abuse of legal process by offending the rules of natural justice on the part of a lower court. Certiorari issues to remove a "suit" from an inferior court into the High Court whether to secure a fair trial or to remedy an excess of jurisdiction. It is also invoked after "trial" to quash an administrative order which has been made without jurisdiction or in defiance of the rules of natural justice. For many years past both orders have been granted against Ministers of the Crown, local authorities and other administrative bodies not primarily judicial in character, to control the exercise of powers of judicial and quasi-judicial decision. They "extend to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights of property of the affected parties."<sup>2</sup> Application is frequently made for both orders, certiorari to review an *ultra vires* act, prohibition to restrain its operation.

<sup>1</sup> See Ministers' Powers Report, pp. 75 *et seq.*, and the cases there cited.

<sup>2</sup> *Local Government Board v. Arlidge* [1915] A.C. 120, at p. 140, in reference to certiorari, but applying equally to prohibition.

In the type of administrative case in which an order is commonly sought against a public body the applicant must show a special grievance over and above that suffered by the public at large. Until recently the application in such a case was made in the name of the King at the instance of his subject. The procedure closely resembled that described in the text for the writ of habeas corpus.<sup>1</sup> But since 1938 orders of certiorari, prohibition and mandamus have been subject to simplified rules of court which may not include any "return" to the order and the old procedure of rule nisi and rule absolute has disappeared. All the writs were prerogative and traced their history back to the early days of the courts separating from the King's Council. This particular exercise of the prerogative was entrusted to the Court of King's Bench to enable it to supervise the administration of criminal and civil justice. Its importance increased with the abolition of the prerogative courts, in particular the Court of Star Chamber, and the consequent cessation of general control by the Privy Council over administration, such as was effective in relation to the poor law administration in Tudor and early Stuart days. The King's Bench was in the eighteenth century the only means of checking, however partially, the autocratic rule of the county justices. The extension of the writs to the statutory authorities of the past hundred years is a natural development. For it was from the justices, or from the authorities created for particular purposes in their place (*ad hoc* authorities), that the elected local authorities derived the powers entrusted to them towards the end of the nineteenth century.

The tendency is to enlarge the scope of both writs. A case of particular interest is *The King v. Electricity Commissioners, ex parte London Electricity Joint Committee*.<sup>2</sup>

The Commissioners possessed statutory powers enabling them to draw up schemes for improving the existing organisation for the supply of electricity in districts. A scheme was not to become operative until a public inquiry had been held and other conditions fulfilled. A writ of

<sup>1</sup> See pp. 214-216.

<sup>2</sup> [1924] 1 K.B. 171; K. & L., 187.

prohibition was granted to prevent the holding of an inquiry on the ground that the scheme to be presented at the inquiry was *ultra vires*. A public body, which could not be regarded as a court of law, was attempting to exercise powers which affected the rights of private companies responsible for the existing supply of electric current. It could not be regarded as exercising legislative, but judicial, functions in proposing to arrive at a decision on a scheme which would affect the rights of the electricity undertakings. Clearly in this sense judicial has a wide meaning which is not referable exclusively to what is done within the jurisdiction of a court of justice. The judgment of Atkin, L.J., as he then was, deserves careful study as affording many illustrations of the circumstances in which the courts have granted the writ in the past. It is also made clear that the common requirement of confirmation by a higher authority does not put an order of a local authority outside the category of a judicial proceeding which can be restrained by means of the writ of prohibition. The case should also be studied in connection with the writ of certiorari.

Neither form of judicial order provides a means of appealing against the proper exercise of a discretionary power by the body to which a discretion has been entrusted by statute. The court has no power to substitute its own discretion for that of the administrative body. It can only restrain an excess or abuse of power: *The King v. London County Council, ex parte The Entertainments Protection Association Ltd.*<sup>1</sup>

Two decisions of the Court of Appeal illustrate the effectiveness of these writs. Both arose out of housing schemes prepared in terms which were alleged not to be authorised by the Housing Act then in force. In both cases the result of the proceedings caused serious delay in the progress of a local authority's housing plans. The second case went to the House of Lords, who reversed the decision of the Court of Appeal, with the result that the Minister's Confirmation Order of November, 1928, was held valid in March, 1931. This case at all events justifies Dicey's claim that a prerogative

<sup>1</sup> [1931] 2 K.B. 215.

writ may be used to hamper the administrative action of the Government! In *The King v. Minister of Health, ex parte Davis*,<sup>1</sup> an owner of property in the area of a proposed improvement scheme applied by a writ of prohibition to prevent the Minister from considering the scheme which he showed to contain provisions *ultra vires* the Housing Act, 1925. He was successful on the ground that it was only within the jurisdiction of the Minister to confirm *intra vires* schemes. In the second case, *The King v. Minister of Health, ex parte Yaffé*,<sup>2</sup> the Minister had first modified the scheme submitted to him by the local authority and had then confirmed it. Prohibition was therefore of no avail. As submitted the scheme contained *ultra vires* proposals; as confirmed it was in law unobjectionable. Although the House of Lords differed from the lower court on the competence of the Minister to confirm a scheme which he had himself amended, both tribunals accepted the view that certiorari would lie to quash the confirmation of a scheme which was *ultra vires* at the time of the Minister making the confirmation order. For the Act only contemplated that schemes should be presented for confirmation if they had been drawn up in strict compliance with its terms.

**Mandamus.**

Mandamus is an order issued by the King's Bench Division to compel the performance of a public duty. The order, which is, like the other prerogative orders and the writ of habeas corpus, granted at the discretion of the court, will only be granted where the applicant has a right to the performance of a legal duty and has no other equally appropriate and convenient means of enforcing its performance, which he must have demanded and been refused. The duty must be one which is obligatory and not discretionary. But there may be an imperative obligation, as there is with a court in trying a case, to exercise discretion one way or another, which is enforceable by this means. This order is the means of compelling justices of the peace and judges and officers of county courts to perform the duties of their office

<sup>1</sup> [1929] 1 K.B. 619.

<sup>2</sup> [1930] 2 K.B. 98; [1931] A.C. 494, (*sub nomine Minister of Health v. The King*).

or to require courts of summary jurisdiction and quarter sessions to state a case for the opinion of the High Court. Mandamus also lies to compel an administrative tribunal to hear and determine an appeal;<sup>1</sup> to require an election to be held;<sup>2</sup> to enforce production to a ratepayer or his agent of the accounts of a local authority, notwithstanding that the officers of the authority could have been prosecuted for non-production;<sup>3</sup> to compel the execution of works by a public utility undertaking under its Private Act. Its application to the Central Government is limited because a Department is, generally speaking, under no duty to the subject, but only to the Crown, to perform its obligations.<sup>4</sup> But it will lie to enforce the performance of some purely statutory duty allotted to the Department, as such, and not exercised by it on behalf of the Crown,<sup>5</sup> if the duty is one which the subject can show to have been owed to himself.

### (B) *The Central Government*

It is a fundamental rule of English law that no action can be brought against the Crown. The rule is based upon the wider principle that the King cannot against his will be made to submit to the jurisdiction of the King's courts. There would obviously be serious injustice if there was no way of making the Crown, acting through the various Departments of State, liable in any circumstances, more particularly in the case of those Departments which are brought into contact with the trading community in connection with the supply of goods for the public service or with the general public by reason of their activities, such as building, naval shipping, military and air transport and the ownership of land for public purposes.

<sup>1</sup> *The King v. Housing Tribunal* [1920] 3 K.B. 334.

<sup>2</sup> *In re Barnes Corporation, ex parte Hutter* [1933] 1 K.B. 688.

<sup>3</sup> *The King v. Bedwelty Urban District Council, ex parte Price* [1934] 1 K.B. 333.

<sup>4</sup> *The Queen v. Lords of the Treasury* (1872) L.R. 7 Q.B. 387.

<sup>5</sup> *The Queen v. Special Commissioners for Income Tax* (1888) 2 Q.B.D. 313, at p. 317.



Contract;  
Scope of  
Petition  
of Right.

Although no action instituted in the ordinary form by writ of summons will lie against the Crown, there is a procedure governed by statute<sup>1</sup> whereby a petition of right may be brought by the subject both for breach of contract and to recover property which is in the hands of the Crown. It extends to the recovery of statutory compensation for the occupation by the Crown of private premises and probably for the enforcement of any obligation which is not tainted with tortious liability: *Thomas v. The Queen*;<sup>2</sup> *Attorney-General v. De Keyser's Royal Hotel Ltd.*<sup>3</sup> But in all contracts by the Crown to pay money there is an implied condition that the obligation is dependent upon the supply of funds by Parliament: *Churchward v. The Queen*.<sup>4</sup> In practice there is no difficulty in securing the payment by the Treasury of any sum awarded by the court to a successful suppliant, though as a matter of law the legal process of execution as a mode of enforcing a judgment debt is not allowed against the Crown. It is a condition precedent to the hearing of a petition by the court that the petition should be endorsed with the words, *fiat justitia*, by the Crown. The *fiat* is granted on the advice of the Home Secretary, who takes the opinion of the Attorney-General. This opinion in practice determines the question whether or not the petition is to proceed to trial. There is no appeal against the refusal of the *fiat*, which is granted on showing a *prima facie* cause of action, but cannot be obtained as of right.

To succeed in a petition of right it is necessary to show a legal right to redress. Thus, in particular, a servant of the Crown who is dismissible at pleasure cannot prove a breach of contract of service if he is dismissed without notice before the stated end of his term of office: *Dunn v. The Queen*.<sup>5</sup> Even where a power to dismiss at pleasure cannot be implied, it does not follow that there is a remedy for breach of contract upon summary dismissal. In *Reilly v. The King*,<sup>6</sup> where an officer appointed under statutory authority lost

<sup>1</sup> Petitions of Right Act, 1860. The text is summarised in Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933), 229-231.

<sup>2</sup> (1874) L.R. 10 Q.B. 31; K. & L. 231.

<sup>3</sup> [1920] A.C. 508; K. & L. 325.

<sup>5</sup> [1896] 1 Q.B. 116; K. & L. 241.

<sup>4</sup> (1865) L.R. 1 Q.B. 173.

<sup>6</sup> [1934] A.C. 176.



his office through its premature termination by Act of Parliament without compensation, it was held that there was no remedy. So far as the law of contract applied, his contract of service became void through impossibility. Such servants of the Crown (they are comparatively few in number) as hold office of a judicial or quasi-judicial character are employed on terms which preclude a power to dismiss at pleasure, *e.g.* where a statute prescribes a power to dismiss for cause stated, such as misconduct: *Gould v. Stuart*.<sup>1</sup> It is indeed not certain how far service with the Crown can be regarded as contractual. It has been held that the Crown cannot by contract hamper its future executive action: *Rederiaktiebolaget Amphitrite v. The King*.<sup>2</sup> In this case it was held that no action would lie for breach of an agreement between the Swedish owners and the British Government whereby the latter undertook to exempt from detention in a British port a neutral ship which traded with Great Britain during the Great War. This was an extreme illustration of the doctrine, and comes near to the conception of act of State; but the rule that, apart from statute, no one has authority on behalf of the Crown to employ anybody except upon terms of dismissal at the Crown's pleasure is based upon similar grounds—that it is in the interests of the State that the Crown should be able to dispense with the services of its officers at any time. Upon this ground the decision in the case of *Dunn v. Macdonald*,<sup>3</sup> which was the sequel to *Dunn v. The Queen*, can be supported. Dunn having lost his petition of right alleged unsuccessfully that Macdonald had impliedly warranted his authority from the Crown to engage him for a fixed period. But Dunn must be taken to have known that Macdonald, a superior officer who had engaged him, had no power in law to include such a term in a contract of service with the Crown.

Thus servants of the Crown, with certain exceptions, do not fall within the benefit of any rule of law which can be enforced in the courts to protect their tenure of office. Such legal rights as they possess are contained in the Superannua-

<sup>1</sup> [1896] A.C. 575.

<sup>2</sup> [1921] 3 K.B. 500; K. & L. 242.

<sup>3</sup> [1897] 1 Q.B. 401; K. & L., at p. 224.

tion Acts, which stop short of giving any legal rights to pensions. Nevertheless the Civil Service in practice enjoys security of employment and, apart from misconduct, its higher ranks are by convention irremovable. Moreover there are rules contained in Orders in Council and Treasury warrants and minutes which provide the effective law of the Civil Service. These rules are not subject to determination by courts of law,<sup>1</sup> because they are made under discretionary powers vested in the Crown. So far as disciplinary rules are concerned, the ultimate judge is the Minister of each Department acting through the senior "permanent" civil servant.

Members  
of the  
Armed  
Forces.

In the special case of members of the armed forces there is to be noted a principle which excludes them from access to the ordinary courts for redress of grievances arising out of dismissal or other punishment by a court-martial or other service tribunal.<sup>2</sup> They enjoy no contractual rights even during their period of service; they cannot sue for arrears of pay: *Leaman v. The King*;<sup>3</sup> no engagement between the Crown and any of its naval or military officers can be enforced in respect of services, past or present, by a court of law: *Kynaston v. Attorney-General*.<sup>4</sup>

Tort; no  
remedy  
against the  
Crown.

A more important result to the general public of the rule that the Crown can do no wrong, which is not affected by procedure by petition of right, is that no action in tort lies against the Crown either in respect of civil wrongs expressly authorised by the Crown or in respect of wrongs committed by servants of the Crown in the course of their employment: *Viscount Canterbury v. Attorney-General*.<sup>5</sup> Under the ordinary common law rule both the master and his servant would be liable in each case. Under the prerogative rule the actual wrong-doer, who will usually be a subordinate official, can alone be sued. Nor is a superior servant of the Crown responsible for wrongs committed by his subordinates in which he takes no part. The reason for this is that one servant is not responsible in law for his fellow-servant's acts, even

<sup>1</sup> See Jennings, *The Law and the Constitution* (2nd ed., 1938), p. 182.

<sup>2</sup> See Keir and Lawson, *Cases in Constitutional Law* (2nd ed., 1933), pp. 336-351.

<sup>3</sup> [1920] 3 K.B. 663.

<sup>4</sup> (1933) 49 T.L.R. 300.

<sup>5</sup> (1942) 1 Ph. 306; K. & L. 244.

when, as is the case with the Crown, the master is immune from vicarious liability: *Bainbridge v. Postmaster-General*.<sup>1</sup> Both Minister and Permanent Secretary alike are as much in the service of the Crown as junior typist, office cleaner or telephone linesman. It is to be observed that in practice the Crown stands behind its servant who is made a defendant in an action for tort, and the Treasury will pay any damages awarded, but there is no legal means of ensuring acceptance of this liability to pay. Nor is it always an advantage for a plaintiff who has been injured, *e.g.* by the negligence of an official, to be opposed by the Law Officers of the Crown and to have to fight his case against the formidable legal talent which the Crown places at the disposal of its erring servant in order to protect the public purse.<sup>2</sup>

Notwithstanding the procedure (formerly by prerogative writ) by judicial order of certiorari or prohibition to control an excess or abuse of jurisdiction by an inferior court, the courts have shown a strong disinclination to interfere with the decisions of a military tribunal. This is so whether the tribunal be a statutory court-martial constituted under the provisions of the Naval Discipline Acts, 1866 and 1884, the Army Act, 1881, or the Air Force Act, 1917, a military court of inquiry, or a commanding officer exercising summary jurisdiction, if the complaint against the findings of the tribunal is based upon reasons of malice or lack of reasonable and probable cause. The argument is that matters falling within the ordinary scope of military discipline ought to be determined by the appropriate military tribunal, subject to review only by higher military authority. It is not clear how far this reluctance of the High Court to exercise its supervisory powers extends. In *Heddon v. Evans* <sup>3</sup> Mr. Justice McCardie drew a distinction between liability for an act done in excess of, or without, jurisdiction, such as an assault, false imprisonment and other common law wrong, and one which, though within jurisdiction and in the course of military discipline, is alleged to have been done maliciously or without reasonable and

Judicial  
Control of  
Service  
Tribunals.

<sup>1</sup> [1906] 1 K.B. 178; K. & L. 252.

<sup>2</sup> For relief by means of an action for a declaration, see p. 542, *post*.

<sup>3</sup> (1919) 35 T.L.R. 142, and R. O'Sullivan, Special Report.

probable cause. Only in the former case would a superior officer or the members of a military tribunal be liable to an action in the ordinary courts.

In the case of *Sutton v. Johnstone*<sup>1</sup> the Court of Exchequer Chamber took the view that questions of malice or lack of cause on the part of an officer instituting court-martial proceedings ought to be tried in the same military jurisdiction as determined the original charge. Chief Baron Kelly in *Dawkins v. Rokeby*<sup>2</sup> expressed the opinion of a court of ten judges that the motives as well as the duty of a military officer acting in a military capacity were questions for a military tribunal alone, and did not fall to be determined by a court of law. Nor would a civil action for libel lie at the suit of a subordinate officer against his commanding officer who had forwarded, with his own comments which were alleged to be defamatory, letters of the plaintiff addressed to a higher military authority: *Dawkins v. Lord Paulet*.<sup>3</sup> But this principle is not easy to accept when the allegation is, not that the accuser before the military tribunal is biassed, but that the tribunal itself has abused its jurisdiction, e.g. that one of the officer judges has acted maliciously. For an excess of jurisdiction, e.g. if a court-martial imposed a sentence not authorised by the Army Act, or sentenced a person not subject to military law (as in *Wolfe Tone's Case*),<sup>4</sup> an order of certiorari or prohibition would lie, but apparently these orders are not available to ensure that a military tribunal observes the rules of natural justice.

The distinction lies in the fact that only when there is an excess of jurisdiction is any common law right of the plaintiff infringed, but *Heddon v. Evans* shows that the distinction is highly unsatisfactory. For what may be tortious when committed in excess of jurisdiction ceases to be tortious although done from the worst of motives if it can be shown to be within military jurisdiction. Moreover it is still open to the House of Lords to hold that the action of

<sup>1</sup> (1786) 1 T.R. 544.

<sup>2</sup> (1873) L.R. 8 Q.B. 255; see also *Re Mansergh* (1861) 1 B. & S. 400; 121 E.R. 764.

<sup>3</sup> (1869) L.R. 5 Q.B. 94; K. & L. 341.

<sup>4</sup> (1798) 27 St. & Tr. 614.

naval or military authorities in dismissing an officer or man from any of the services is a matter cognisable in a court of law: *Fraser v. Balfour*,<sup>1</sup> per Finlay, L.C.; for the decision of the House of Lords in *Dawkins v. Rokeby*<sup>2</sup> was on the ground of privilege of witnesses and did not affirm the wider proposition laid down in the Exchequer Chamber that such questions are not cognisable in a court of law. But as the law stands to-day persons in the military service of the Crown are excluded from access to the civil courts, if it can be shown that the cause of action is one which is properly cognisable by a military tribunal, no matter whether the motive of the defendant be in issue.

The rule that the Crown may not be sued in tort protects Government Departments whose acts are the acts of the Crown, but it has been laid down by statute that certain Government Departments may sue or be sued in their own name. It is necessary to look at the particular statute concerned to decide (1) whether such provision is purely procedural and designed to enable ordinary civil procedure to be used by or against the Crown where a right of action exists, or (2) whether it creates a new right of action and removes the prerogative immunity, thus making it possible to sue the Department or Minister in respect of a contract or in respect of a tort committed by subordinates. It is clear that the Minister of Transport may be sued in respect of contracts and torts arising out of his Department.<sup>4</sup> In *Graham v. Commissioners of Public Works*<sup>5</sup> it was held that the Commissioners, a body incorporated by statute, could be sued in respect of a contract for the erection of a public building, but the reasoning would equally apply where there was no incorporation. In *Rowland v. Air Council*<sup>6</sup> it was held that the Air Council, which has not been incorporated, could not be sued on a

<sup>1</sup> (1918) 87 L.J.K.B. 1116.

<sup>2</sup> (1875) L.R. 7 H.L. 744.

<sup>3</sup> The three following paragraphs are taken with minor alterations from Wade and Phillips, *Constitutional Law* (2nd ed., 1935), pp. 346-349. The editor's acknowledgment is made to Messrs. Longmans, Green & Co. for their courtesy in permitting the use of the paragraphs here.

<sup>4</sup> Ministry of Transport Act, 1919, s. 26; the section expressly provides for liability in contract, tort, or otherwise.

<sup>5</sup> [1901] 2 K.B. 781.

<sup>6</sup> (1923) 39 T.L.R. 228.



contract made on the Crown's behalf, though the Act (Air Force (Constitution) Act, 1917) provided that the Council might sue and be sued by that name (s. 10 (1)); see also *Rowland and Mackenzie-Kennedy v. Air Council*<sup>1</sup> (no liability for contract made on behalf of Crown), and *Mackenzie-Kennedy v. Air Council*<sup>2</sup> (action in tort will not lie against the Air Council). In *Gilleghan v. Minister of Health*,<sup>3</sup> where there was a similar statutory provision, but the Minister had been created a corporation sole for limited purposes, it was again held that no action lay when it was sought to maintain an action in contract against the Minister in relation to a matter which did not lie within the limited purposes of the incorporation. Such fine distinctions are a genuine hardship to *bona fide* claimants, whose advisers are uncertain what procedure to adopt in face of the obscure state of the law.

The peculiar position of the Crown in litigation was described by the Committee on Ministers' Powers as giving rise to a "lacuna in the rule of law."<sup>4</sup> They pointed out that not only was the Crown not liable to be sued in tort, but also there was no effective remedy against the Crown in the County Court, and further the Crown had procedural advantages in litigation with subjects. They considered that Continental critics were justified in contending that under the rule of law in England the remedy of the subject against the Administration is less complete than the remedy of subject against subject. In addition to the inevitable advantage of the resources of the public purse, it was the rule at common law that the Crown neither paid nor received costs. Unless otherwise provided by statute, actions brought by the Crown were brought not by the ordinary procedure, but by Latin or English informations, archaic and unfamiliar forms which involved a defendant in extra legal expense. The Crown was not subject to the ordinary Statutes of Limitation and a right of action by the Crown was not barred for 60 years. In all actions, whether between the Crown and subjects or between subjects and subjects, the State may seek to prevent the disclosure of a document or of a class of documents which it

<sup>1</sup> (1927) 96 L.J. Ch. 470.

<sup>2</sup> [1927] 2 K.B. 517.

<sup>3</sup> [1932] 1 Ch. 86.

<sup>4</sup> Ministers' Powers Report, p. 112.



is not in the public interest to disclose. This is no hardship, as the court may inspect the document in order to test the validity of the claim of privilege.<sup>1</sup> But in actions to which the Crown is a party the subject suffers an additional disadvantage in that there is not available against the Crown the process known as discovery, by which a litigant can be compelled to disclose the nature of the relevant documents in his possession.

The whole question was in 1921 referred to a Committee, Crown Proceedings Committee, which reported in 1927 in the form of a draft Bill.<sup>2</sup> Under this Bill it was recommended (a) that the Crown should be liable in tort; (b) that the Crown itself should enjoy the protection of the Public Authorities Protection Act, 1893,<sup>3</sup> in the same way that servants of the Crown are protected under the present law; (c) that petitions of right should be abolished and that proceedings by and against the Crown should be assimilated, as far as is possible, to ordinary civil proceedings; (d) that costs should be awarded to and against the Crown; (e) that discovery should, with proper safeguards, be available against the Crown. The Report has met with the support of lawyers and was endorsed by the Committee on Ministers' Powers. It has not, however, yet become law, though by the Administration of Justice (Miscellaneous Provisions) Act, 1933, it has been enacted (a) that proceedings by the Crown (though not proceedings against the Crown) may be instituted in the County Court; (b) that debts due to the Crown may, without prejudice to procedure by means of information, be recovered by proceedings instituted by an ordinary writ of summons; (c) that costs may be awarded to or against the Crown in any civil proceedings to which the Crown is a party. The opposition to the adoption of the Report as a whole has so far been

<sup>1</sup> It is considered that this is a correct statement of the law, see *Spiegelmann v. Hocker* (1933) 50 T.L.R. 87; *Robinson v. State of South Australia* [1931] A.C. 704—(a Privy Council case discussing an Australian State rule of court in the same terms as the English rule (R.S.C., O. xxxi. r. 19 (a) (2))). But in *Ankin v. London and North Eastern Railway* [1930] 1 K.B. 527, it was held by the Court of Appeal that privilege could properly be claimed for a document the production of which was contrary to the public interest; normally the court will accept a Minister's assurance, but it probably has an absolute discretion to decide for itself.

<sup>2</sup> Crown Proceedings Committee Report, 1927, Cmd. 2842.

<sup>3</sup> For text see App. sec. vi.

stubborn. Law Officers have repeatedly declined to accept the principle that the Crown should be made liable in tort, but the recent changes just referred to may be taken as evidence of a change of opinion, and it can only be a matter of time before it is conceded that the Crown shall be liable in tort.

### (C) *Local Authorities*<sup>1</sup>

Doctrine of  
*ultra vires*.

Local authorities in England and Wales are the County Councils, the Metropolitan Borough Councils, the Borough Councils (acting on behalf of municipal corporations), the District Councils (Urban and Rural) and the Parish Councils.

Apart from certain qualifications in the case of borough councils, all these bodies are subject to the general rule of *ultra vires*: *Baroness Wenlock v. River Dee Co.*<sup>2</sup> A statutory corporation has no power to do any act which is not authorised by statute, or by the memorandum of association in the case of companies incorporated under the Companies Act, 1929: *Ashbury Railway Carriage and Iron Co. v. Riche*.<sup>3</sup> It is sufficient for the exercise of a power that it be incidental to the exercise of an express statutory power: *Attorney-General v. Great Eastern Railway Co.*,<sup>4</sup> but an act which is *prima facie* within a statutory power may be held invalid if it has been exercised for a wrong purpose or by a wrong procedure.<sup>5</sup>

So far as general legal powers are concerned a local authority may exercise such of the powers of a natural person as are conferred upon it by the Local Government Act, 1933—the constituent enactment relating to local authorities which confers their general powers. As a governmental body a local authority derives its powers from special statutes, such as those dealing with public health, housing, highways, poor relief (public assistance), regional planning, education and similar public services. When the validity of an act done by a local authority is questioned in

<sup>1</sup> See especially Jennings, *The Law relating to Local Authorities* (1934), chs. v and vi; Robinson, *Public Authorities and Legal Liability* (1925).

<sup>2</sup> (1885) 10 App. Cas. 354.

<sup>3</sup> (1875) L.R. 7 H.L. 653.

<sup>4</sup> (1880) 5 App. Cas. 473.

<sup>5</sup> See p. 487, *ante*.

the courts, the application of *ultra vires* is usually in relation to the interpretation of these special statutes granting specific powers. These, of course, include many powers which no individual exercises in his private capacity.

The fact that the local authority has been endowed with a corporate personality is irrelevant for this purpose. The special statute would be interpreted in exactly the same way by reference to the doctrine of *ultra vires* if the defendant authority was an unincorporated body. Excess of special statutory powers is both void and illegal, as infringing individual liberty of action, e.g. in the exercise of compulsory acquisition of property. There is, however, no illegality in exceeding corporate capacity as such: the excess is merely void as being something within the lawful capacity of the individual which is not granted to the corporation by its constitution. This distinction may be of importance in determining tortious liability, which can only lie for a wrongful, i.e. illegal, act.

The powers of the statutory local authorities (i.e. all Contracts. except municipal boroughs) to acquire property are confined to the fulfilment of their statutory functions. Contractual capacity of all local authorities is defined by Local Government Act, 1933, s. 266.

(1) A local authority may enter into contracts necessary for the discharge of any of its functions.

(2) All contracts made by a local authority or by a committee thereof shall be made in accordance with the standing orders of the local authority, and in the case of contracts for the supply of goods or materials or for the execution of works, the standing orders shall:

(a) require that, except as otherwise provided by or under the standing orders, notice of the intention of the authority or committee, as the case may be, to enter into the contract shall be published and tenders invited; and

(b) regulate the manner in which such notice shall be published and tenders invited:

Provided that a person entering into a contract with a local authority shall not be bound to inquire whether the standing orders of the authority which apply to the contract have been complied with, and all contracts entered into by a local authority,

if otherwise valid, shall have full force and effect notwithstanding that the standing orders applicable thereto have not been complied with.

But it is in connection with tortious liability that the legal position of local authorities and their servants is of interest as a matter of administrative law.

In order to establish liability for damage caused by the exercise of statutory powers, it is necessary to show that some wrongful act has been committed. The general principle is that, where Parliament has expressly authorised something to be done, the doing of it cannot be wrongful. Thus any damage resulting to private individuals is *damnum sine injuria*, which is not actionable at the suit of a private individual. Compensation for such injury is commonly provided by Parliament. But the courts construe statutory powers strictly, i.e. in favour of the citizen, and will not interpret such powers as authorising interference with private rights if they are not imperative: *Metropolitan Asylum District v. Hill*.<sup>1</sup> If the performance of a statutory duty is imperative, or the exercise of a statutory power inevitably causes injury to a private individual, there is no remedy at common law: *Hammersmith and City Railway Co. v. Brand*.<sup>2</sup> But if the exercise of a statutory power necessarily results in such injury, a local authority must avoid aggravating the injury by negligent execution and must exercise to the full any other powers whereby such injury could be avoided: *Geddis v. Proprietors of Bann Reservoir*.<sup>3</sup>

Liability  
for wrongs  
of  
omission.

A local authority, like any other corporation, is, generally speaking, liable for a breach of duty by omission when that breach is a tort which, if committed by a private person, would have rendered that person liable. Such cases are rare, for tortious liability usually involves either a positive wrongful act or at least a failure to act which constitutes negligence. In some few cases the breach of a statutory duty through non-performance does not constitute a tort, if the duty is owed to the public and not to an individual. This class of case is illustrated by *Cowley v. Newmarket Local*

<sup>1</sup> (1881) 6 App. Cas. 193.

<sup>2</sup> (1868) L.R. 4 H.L. 171.

<sup>3</sup> (1878) 3 App. Cas. 430, at pp. 455-456.

*Board*,<sup>1</sup> where failure to keep a highway in proper repair to the injury of an individual, as opposed to the public at large, was held not to impose upon the highway board tortious liability to the person injured. Breach of a statutory duty by a local authority may moreover be (and usually is) redressable by a statutory remedy which excludes the common law remedy of damages: *Saunders v. Holborn District Board*<sup>2</sup>—where failure to perform the statutory duty of clearing street refuse was held not to entitle a person suffering special damage to any right of action. A breach of duty may also be punishable on indictment as a misdemeanour<sup>3</sup> or as a public nuisance where the breach is injurious to the public as such.

To impute liability to a corporate body as an artificial legal entity for positive acts of wrong-doing, intentional or negligent, is logically impossible. For the doctrine of *ultra vires* excludes the possibility of a corporation having amongst its limited powers the statutory power to commit torts. A local authority may have power to commit acts (e.g. to coerce individuals in order to tax them or to acquire their property against their will) which would be tortious in the individual at common law. But the very fact that a power is statutory makes it legal and excludes liability for its exercise within the terms of the statute. The doctrine of vicarious liability has, however, overcome this logical difficulty. A local authority is thus liable for the tortious acts of its servants and agents which are intentional or negligent: *Ellis v. Fulham Borough Council*<sup>4</sup> (negligence by reason of inadequate measures to render a paddling pool safe for children resorting thereto in a public park); *Metropolitan Asylums District v. Hill*<sup>5</sup> (erection of a smallpox hospital under statutory powers in a manner which caused a common law nuisance). This liability includes fraud, false imprisonment, conspiracy and maintenance. The limitation is that the

Liability for intentional or negligent wrong doing.

<sup>1</sup> [1892] A.C. 345; cf. *Guilfoyle v. Port of London Authority* [1932] 1 K.B. 336, where it was held that there was liability for breach of statutory duty to repair a bridge which was not part of the highway.

<sup>2</sup> [1895] 1 Q.B. 64.

<sup>3</sup> *The King v. Pinney* (1832) 3 B. and Ad. 947; K. & L. 363.

<sup>4</sup> [1938] 1 K.B. 212.

<sup>5</sup> (1881) 6 App. Cas. 193.



agent or servant must have acted within the scope of his employment, as defined by the general law relating to vicarious liability.

The difficulty that the commission of any tort by a corporation is *ultra vires* is overcome by including within the scope of employment any act done by the servant, even though it be tortious, which is within the general scope of the authority's statutory powers: *Percy v. Glasgow Corporation*<sup>1</sup> illustrates this. Two municipal tramway employees in the course of their employment as collectors of fares gave a passenger into custody, in circumstances which amounted to false imprisonment through a mistake in interpreting their powers as employees of the corporation. Moreover in a number of cases a local authority has been held liable, even though neither the authority nor its servants were acting within the general scope of statutory powers. In *Campbell v. Paddington Corporation*,<sup>2</sup> a stand built by employees of a corporation which had no power to authorise its erection was held to constitute a public nuisance. Avory, J., seems to have regarded a resolution of the council to erect the stand as an authentic act of the corporation. He dismissed as absurd the view that the corporation could not be sued because it had no legal right to do what it had done. Thus a local authority enjoys no special immunity as such, though as with other corporations it is but seldom that the act which constitutes a tort can in fact be imputed to the entity (as opposed to its servants or agents).

It is, however, not always the case that persons who are apparently the employees of a local authority are acting in that capacity in the commission of the act which constitutes the tort. They may, as in the general law of vicarious liability of a master for his servants' acts, be engaged upon "frolics of their own." They may have such powers of independent discretion as not really to be under the control of the authority in the exercise of the function in question; as for example in *Evans v. Liverpool Corporation*,<sup>3</sup> where the corporation was held not liable for the negligence of a visiting physician employed at a hospital for infectious diseases which

<sup>1</sup> [1922] 2 A.C. 299.

<sup>2</sup> [1911] 1 K.B. 869.

<sup>3</sup> [1906] 1 K.B. 160.



was provided under statutory powers. Again they may be acting under the control of a central authority, even though appointed by a local authority, or exercising general statutory powers which do not constitute them the servants of the appointing authority. Thus in *Stanbury v. Exeter Corporation*,<sup>1</sup> an inspector was appointed by the corporation under the Diseases of Animals Act, 1894, the execution and enforcement of the provisions of which were laid upon local authorities. The corporation was held not liable for his negligent conduct in having seized and detained in a market sheep suspected of disease. The inspector was acting under an order of the Board of Agriculture (as it then was) and therefore was not negligent in the performance of duties delegated to him by the corporation.

In *Fisher v. Oldham Corporation*<sup>2</sup>—an action for false imprisonment—a police constable was held not to be the servant of the watch committee which had appointed him, paid, clothed and could dismiss him, when he mistakenly arrested the wrong person. For powers of arrest are conferred upon a constable by statute and in exercising them he is not the servant of the local police authority.

In the case of servants of the Crown it is to be remembered that for a tortious act as well as for a crime the actual wrongdoer is personally liable. Officers of a local authority are seldom made defendants, partly on account of the statutory exemptions under the Public Health Act,<sup>3</sup> partly because in practice the authority itself is more worth suing. Officers and other employees of local authorities also enjoy the considerable protection of the Public Authorities Protection Act, 1893.<sup>4</sup> Thus, subject to the provisions of these Acts, so far as liability is incurred for breach of contract or for tort by local authorities (whether directly or vicariously for the acts of their servants and agents) they may be amenable to ordinary process of the courts.

The doctrine of *ultra vires* is often invoked by an interested ratepayer who has suffered no damage from either

Injunctions;  
Declaratory  
Judgments.

<sup>1</sup> [1905] 2 K.B. 838; see also *Tozeland v. West Ham Union* [1907] 1 K.B. 920.

<sup>2</sup> [1930] 2 K.B. 364. <sup>3</sup> See p. 488, n. 1, *ante*. <sup>4</sup> For text see App. sec. vi.

of these common law causes of action. Here equity out of its ordinary range of remedies provides in the injunction a powerful weapon to restrain excess of power: *Attorney-General v. Merthyr Tydfil Union*.<sup>1</sup> An injunction lies not merely to restrain *ultra vires* acts which have already been committed from being repeated, but also to prohibit an excess of power which is anticipated. It may be granted irrespective of the existence of other remedies: *Attorney-General v. Sharp*.<sup>2</sup>

The court can also grant relief by a declaration<sup>3</sup> under Order xxv, s. 5, which reads as follows:

No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could be claimed.

This type of "remedy" achieved popularity with Trade Unions and their members who are prevented from enforcing directly certain contracts by the Trade Union Act, 1871, s. 4: *Kelly v. National Society of Operative Printers' Assistants*.<sup>4</sup> It has also been used against the Attorney-General to obtain relief against the Crown: *Dyson v. Attorney-General*; <sup>5</sup> though its application to mitigate the hardships of the Crown's immunity from suit is somewhat narrow. For it does not, it would seem, lie for a money claim against the Treasury which can only be the subject of a petition of right.<sup>6</sup> Somewhat similar to a declaratory judgment is the practice of local authorities agreeing to state a case on points of law for the decision of the court.

Normally actions for declaratory judgments are brought in cases where some other remedy is or could be claimed; in practice that other remedy is an injunction, or (rarely) specific performance. But it is an obvious convenience in a dispute (say) between two public authorities to be able to have the law determined in its application to a particular case without seeking a coercive remedy against the opposing

<sup>1</sup> [1900] 1 Ch. 516.

<sup>2</sup> [1931] 1 Ch. 121.

<sup>3</sup> Jennings, "Declaratory Judgements against Public Authorities in England"; 41 *Yale Law Journal* (1931-32), 419.

<sup>4</sup> (1915) 84 L.J.K.B. 2236.

<sup>5</sup> [1911] 1 K.B. 410; *K. & L.* 265.

<sup>6</sup> Rowlatt, J., in *Bombay and Persia Steam Navigation Co. v. Maclay* [1920] 3 K.B. 402, at p. 408.

side. Within certain limits this type of relief may be sought, even when no consequential relief could be claimed.<sup>1</sup> The same is true of the remedy by injunction.

An injunction or a declaration can be claimed by an individual against a local authority if he has suffered special damage to his person or his property. If his interest in a dispute is merely that of one of the general body of rate-payers, the proceedings, which are known as relator actions, are brought in the name of the Attorney-General at that officer's discretion, either to restrain a public nuisance or to prevent a local authority from exceeding its statutory powers: *Attorney-General v. Tynemouth Corporation*,<sup>2</sup> a case where certiorari was also available to test the validity of the matter in issue. But a person can sue without joining the Attorney-General (1) if interference with a public right, such as obstruction on the highway, also constitutes a tort against the plaintiff; (2) where no private right of the plaintiff is interfered with, but he in respect of a public right suffers special damage peculiar to himself from the interference with the public right, e.g. where he would suffer greater inconvenience than his neighbours from interference with an open space over which the public had rights of access.<sup>3</sup> By the Local Government Act, 1933, s. 84, procedure by *quo warranto* has been superseded for the purpose of deciding the validity of tenure of an office by a simpler process in the High Court or in a court of summary jurisdiction. Proceedings may be instituted against any person acting as a member of a local authority or as a mayor of a borough on the ground of disqualification for office. The High Court may grant a declaration that the office is vacant, an injunction to restrain the defendant from acting in the office, and may order the payment of penalties. A court of summary jurisdiction has power to fine up to a maximum of £50 for each conviction of a person for acting in his office while disqualified.

There remains procedure by order (formerly prerogative writ) to which reference has already been made.<sup>4</sup>

<sup>1</sup> See Jennings, *op. cit.*, pp. 416-421.

<sup>2</sup> [1899] A.C. 293.

<sup>3</sup> *Boyce v. Paddington Corporation* [1903] 1 Ch. 109.

<sup>4</sup> App. sec. i (6) (A), *ante*.

Procedure by mandamus, prohibition and certiorari play a prominent part in the settlement of administrative disputes with local authorities. Since, as has been seen, decisions in the judicial and quasi-judicial manner become increasingly the duty of administrative authorities, prohibition and certiorari, which only lie for excess of jurisdiction or illegality, are invoked against the decisions of assessment committees, housing and town planning authorities and licensing bodies.

#### (D) *Independent Statutory Authorities*<sup>1</sup>

No attempt to classify the various independent authorities which Parliament has created outside the accepted categories of Government Departments and elected local authorities is needed for our purpose. Independence sometimes means freedom from Treasury control, but generally speaking by independent statutory authority is meant one of the numerous bodies which are not represented by a Minister in Parliament. For the purpose of determining the legal liability to the ordinary courts of these bodies and their officers and servants, it is necessary to examine in each case the Act of Parliament which contains their constitution. In general a statutory authority is a body corporate with a common seal and with power to hold land without licence in mortmain. It is only in exceptional cases that these bodies act on behalf of the Crown and so come within the same category as those Government Departments which enjoy the status of incorporation without losing the prerogative immunities of the Crown.<sup>2</sup> The functions of the Unemployment Assistance Board and of the officers and servants appointed by the Board are exercised on behalf of the Crown.<sup>3</sup> There are similar provisions in the constitutions of the Commissioners for the Special Areas and the Live Stock Commission.<sup>4</sup> Thus

<sup>1</sup> For accounts of public service authorities, see Terence O'Brien, *British Experiments in Public Ownership and Control* (1937); and *Public Enterprise* (1937), edited by W. A. Robson.

<sup>2</sup> App. sec. 1 (6) (B), *ante*.

<sup>3</sup> Unemployment Act, 1934, 6th Sch., para. 9.

<sup>4</sup> See Special Areas (Development and Improvement) Act, 1934, 2nd Sch., para. 5; Live Stock Industry Act, 1937, s. 1, 1st Sch., para. 2.

it would appear that in the case of these authorities their legal liability is to be determined by the same rules which apply to the liabilities of Government Departments, though constitutionally speaking they enjoy a measure of independence from parliamentary control and are not represented, directly at all events, by a Minister in Parliament.

It is not possible to give a detailed list of the governmental organs, apart from the local authorities, which are not represented in Parliament,<sup>1</sup> but generally speaking it has not been found necessary to confer upon these bodies the immunities from legal liability enjoyed by the Crown. Accordingly, if an authority is a statutory body, legal liability is determined by the same rules as apply to local authorities. Amongst the bodies that fall in this category may be mentioned the Central Electricity Board, the British Broadcasting Corporation which operates under Royal Charter and under a licence from the Postmaster-General, the London Passenger Transport Board, the Agricultural Marketing Boards, the Wheat Commission, and the Coal Mines Reorganisation Commission. It follows that the officers and servants of these bodies are protected in their relations with the body employing them by the ordinary law of master and servant, unlike their colleagues in the Civil Service.

In some cases Parliament has recognised the public functions of these bodies by protecting from disclosure information furnished to them in the course of their duty. While this does not affect directly their legal liability, it may have a considerable effect upon legal proceedings arising out of their activities. Thus, for example, although the Potato Marketing Board is not a Department of State but "a domestic executive body with statutory powers," returns furnished to the Board are privileged from disclosure, under summary penalty, in all legal proceedings other than those specifically excepted by statute.<sup>2</sup> A similar protection is afforded to information supplied to the Import Duties

<sup>1</sup> For a comprehensive list see Jennings, *Cabinet Government* (1936), pp. 433-435.

<sup>2</sup> Agricultural Marketing Act, 1931, s. 17 (2). See *Rowell v. Pratt* [1938] A.C. 101.

Advisory Committee and to the Coal Mines Reorganisation Commission.<sup>1</sup>

It is interesting to note that bodies like the Central Electricity Board and the London Passenger Transport Board, which are examples of public bodies engaged in trade, operate under a very different constitution from that of the Post Office, which so far as legal liability is concerned is still able to oppress both its customers, the public and its numerous servants with the niceties of the law relating to proceedings against the Crown. There is no justification, save in the seniority of the Department, for this distinction being made in the liabilities of monopolistic public undertakings.

There are a few other authorities which cannot be properly described as Government Departments, since no Minister answers for them in Parliament. They do not fit into the category of independent statutory authorities. The principal examples are the Charity Commission and the Forestry Commission. There is no express provision in the constituent Act for either Commission to exercise powers on behalf of the Crown. Each contains one or more members appointed from among members of the House of Commons, but they do not rank as Ministers. The Commissioners are appointed by the Crown, and may be regarded as acting on behalf of the Crown and, therefore, as enjoying immunity from process to the same extent as Government Departments.<sup>2</sup> In the case of the Charity Commission there is no provision that the Commission may sue and be sued. There is such a provision in the case of the Forestry Commission, but, as has already been seen,<sup>3</sup> this probably does not by implication deprive the Commission of the privileges of the Crown as litigant.<sup>4</sup>

<sup>1</sup> See Import Duties Act, 1932, s. 10; Coal Mines Act, 1930, s. 8.

<sup>2</sup> But cf. *Graham v. Commissioners of Public Works* [1901] 2 K.B. 781.

<sup>3</sup> See p. 533, *ante*.

<sup>4</sup> But cf. *Gilleghan v. Minister of Health* [1932] 1 Ch. 86.



## SECTION II

## PUBLIC MEETINGS AND LIBERTY OF DISCUSSION

## INTRODUCTORY

THE opinion has been expressed in the Introduction<sup>1</sup> that the importance of Dicey's interpretation of the rule of law to the student of public law to-day lies largely in the influence it has exerted towards preserving liberty of speech and of association from restrictions imposed by Parliament, which would empower the Administration to suppress political criticism. It is clear that "arbitrary" power could be conferred by statute so as to inhibit freedom of speech, just as administrative law has encroached upon individual rights in other directions. The object of the two notes which follow is to indicate how far in the present state of the law the Government possesses the means of suppressing criticism and the articulation of opinion hostile to themselves. The result will show that Dicey's first meaning of the rule of law does not, as the law of England stands to-day, substantiate his deduction that, because a man can only be punished for a breach of the law, the Government has not the means of exercising a wide discretionary authority to control political discussion. That no Government would exercise its legal powers to the full is not due to any application of the separation of powers to the distribution of governmental functions under the constitution, for the courts can but apply the law if it is invoked in all its severity. The effective safeguard lies in the presence of an elected House of Commons where the right of His Majesty's Opposition to criticise, to question and to oppose is jealously preserved.

(1) THE LAW OF PUBLIC MEETINGS<sup>2</sup>(A) *The Problem*

The fundamental principle of the British constitution is that of democracy. Freedom of association as well as

<sup>1</sup> Pp. lxxiii, lxxxiii, *ante*.

<sup>2</sup> Part of this sub-section was published as an article in *Modern Law Review*, December, 1938.

freedom of speech are essential to democracy. "Without free elections the people cannot make a choice of policies. Without freedom of speech the appeal to reason which is the basis of democracy cannot be made. Without freedom of association electors and elected representatives cannot band themselves into parties for the formulation of common policies and the attainment of common ends."<sup>1</sup>

The various extensions of the franchise have secured that the people may make their free choice by election protected by the provisions of the Ballot Act, 1872, and of the legislation against corrupt and illegal practices. The law of public meetings deals with the legal aspect of public expression of opinion by the spoken word and by demonstration. Its object is primarily to prevent and to punish outbreaks of disorder. For this reason Dicey based his argument upon the assumption that all meetings were lawful unless the misdemeanour of unlawful assembly was committed by the participants. This note, which attempts to deal in outline with the powers of the police to control meetings and processions, shows that the offence of unlawful assembly plays only a small part in the potential control over public expression of opinion which can be exercised by the Administration. A distinction may be drawn at the outset between liberty to express opinions, political or otherwise, from the liberty which the law affords as to choice of time and place. The present note deals with the latter aspect of freedom of speech.

Liberty of speech is conditioned, as a matter of private law, by the law of libel and slander, irrespective of the place of utterance. Substantially this is true also of the limitations imposed upon speakers by the criminal law of blasphemy, obscenity and even sedition. But public law—for such undoubtedly is that part of criminal law which relates to offences against the State and public order generally, whatever may be said about offences against individual persons and their property—without denying liberty of speech as such, is concerned to restrict the mode of its exercise in public places on several grounds. Speakers in the past

<sup>1</sup> Jennings, *Cabinet Government* (1936), p. 13.

have been prosecuted for riot and kindred offences, of which unlawful assembly has been the most fruitful of judicial decisions, and, it so happens, of obscurity as to the state of the law. To-day, with the recognition that it is the function of the police to prevent as well as to secure punishment for offences, clashes between the police and speakers at public meetings more often result in (i) applications to magistrates to bind over speakers suspected of likelihood of causing breaches of the peace under the old jurisdiction which dates from a fourteenth-century statute and perhaps is inherent in the commission of the peace—*Lansbury v. Riley* ;<sup>1</sup> (ii) charges of obstructing the police in the execution of their duty under the Prevention of Crimes Acts, 1871 and 1885 ; or (iii) and most frequently, summary charges of insulting words or behaviour or of assault.

But whatever be the technique of legal administration it will be admitted that the law is not entirely clear. This is an inherent defect in the methods of our common law. That it can be cured, given sufficient measure of public agreement, is shown by the enactment of the Public Order Act, 1936, though that every public ill can be cured by legislation is a proposition to which assent should not be too readily given. Before then considering the law it is well to inquire as to what are the prospects of sufficient agreement as to the right attitude of a democratic State towards free expression of opinion by means of public speeches and demonstrations. In passing it may be noted that it is not always the case in a written constitution that any right of public meeting should be among the constitutional rights conferred by the constitution, *e.g.* in Belgium, public meetings are entirely subjected to police regulations. A Government of the United Kingdom in the mid-twentieth century is sufficiently alive to the necessity of listening to protests against public evils without the protestants having to resort to force to secure their ends. It is true that it is only a quarter of a century ago that the suffragette movement demonstrated against the Government with a show of violence. Nor can the problems of the Governments in India or the Administra-

<sup>1</sup> [1914] 3 K.B. 229.

tions of Palestine and some of the Colonies be overlooked. But if in the present conditions in England a Government can afford to allow the armoury of legal weapons which are available to interfere with demonstrations against its policy to rust and decay, so far as concerns the safety of Ministers and public buildings, it remains true that the inhabitants of localities are still liable to suffer grave inconvenience from the enthusiasm of agitators. In other words the problem of control of public speech is one which ought to be approached from the point of view of the private citizen and his need for protection, rather than of the safety of the State and its officers.

The problem of maintaining order in Bermondsey seems on this view to differ fundamentally from that of the disorders which broke out in the earlier part of the nineteenth century. For it is no longer the Government which as a whole needs to protect itself and its rich supporters from violence; it is householders and their families, chiefly in poorer districts, who look to the Government, *i.e.* to the police, to protect them on occasions such as Fascist and Communist demonstrations, and to a minor extent at general elections. From certain public utterances of the present Home Secretary one may be assured that he at least is alive to the private nuisance aspect of unlicensed liberty to speak and demonstrate in public to the annoyance of one's neighbours. And it is a view which the metropolitan magistrates can confirm.

Accepting the belief that meetings and processions serve an essential purpose and have their value as characteristics of democracy, to what extent ought the law to provide and its administrators to exercise power to curb these demonstrations? The law should be clarified and relieved of obsolescent statutes of the eighteenth and early nineteenth centuries, which were passed to meet emergencies of a different character and administered by government officers before the days of the modern police. Few would regret the repeal (or advocate the re-enactment, as the case may be) of the Seditious Meetings Act, 1817 (one section of which survives), or any of the Six Acts.

But however much the law is clarified, the problem of its administration remains. There will always be over-zealous police officers whose suspicions and beliefs as to the probability of breaches of the peace will result in proceedings in courts of summary jurisdiction, if not in actual force being employed by the police against demonstrators who do not actually intend to disturb the peace, but are advocates of an unpopular cause. Some discretion must be entrusted to the police, no matter how precisely the law is formulated. There is need as much for the formulation of policy which will influence police administration as for actual reform of the law. The police function does not differ essentially from that of most administrators. It calls for the exercise of discretion at every turn. It is noticed because more members of the public are directly concerned with police activity than with that of Government Departments. Courts of law are not the best agencies for controlling the exercise of administrative discretion.

There is no need to accept all the criticisms which have been directed against the police of recent years. That a few deplorable incidents have occurred may be conceded. But in this connection there may be detected a tendency on the part of authority to deal more harshly with counter-demonstrations than with promoters of meetings which provoke such a form of opposition. This is sometimes construed as favouring the Right Wing against the Left. But it is submitted that the real explanation is that the supporters of the Extreme Left, if only because of lack of funds to organise meetings and to advertise, are more often found in counter-demonstrations than as conveners of the meetings which cause them to assemble. It was stated in the House of Commons by the Under-Secretary of State for the Home Office in December, 1937, that in a period of five months at twenty meetings the promoters were asked to close down because of the attitude of the crowd; thirteen of these were Fascist meetings. The action of the police in favouring the meeting first in the field is not merely excusable, but strictly in accordance with their duty to preserve order at a meeting lawfully assembled: Tindal, C.J., *Charge to the Bristol*



*Grand Jury* : <sup>1</sup> *The King v. Pinney*.<sup>2</sup> Moreover the appeal to reason which freedom of speech should secure is defeated if the appeal is made inaudible by counter-demonstrations.

But what is the policy which ought to influence the law and its administration? Can we strike a happy mean, which, while freely allowing expression of all points of view in public, nevertheless permits authority to prevent disorder in the neighbourhood? Ought liberty of speech to include licence to provoke opposition to the point of disorder? It may be that, until we have learned a greater measure of toleration—and great improvement has been achieved in this direction in the past century and more—no solution is practicable. Something could be done by affording fuller facilities for the free use of public buildings to all political organisations, such as is at present granted by the law at election times to candidates. This would have the effect of checking the desire for marches of impecunious demonstrators which so seldom achieve their purpose, and which so frequently embarrass the reasonable use of the highway by the inhabitants of districts which they frequent. If public opinion will not tolerate the total banning of street meetings and processions by the police, such as has been enforced under statutory powers in certain districts of London for many months, it must seek to reduce the causes which lead not infrequently in certain quarters to disorder. These causes are in part due to hooliganism, in part to provocation by enthusiasts for an unpopular cause, but it may be surmised that the resistance shown to such enthusiasts does not always come from those whom they deliberately provoke so much as from irresponsible hangers-on. It is not always Jews or Fascists who are charged after meetings and processions of the latter.

### (B) *The Present State of the Law*

Dicey contributed a long note <sup>3</sup> to his chapter on the Right of Public Meeting (Chapter VII).

<sup>1</sup> (1832) 5 Car. & P. 261; K. & L. 359.

<sup>2</sup> (1832) 9 B. & Ad. 947; K. & L. 363.

<sup>3</sup> 8th ed. (1915), pp. 497 *et seq.*



Four important questions connected with the right of public meetings require consideration.

These inquiries are :

First : Whether there exists any general right of meeting in public places ?

Secondly : What is the meaning of the term, unlawful assembly ?

Thirdly : What are the rights of the Crown or its servants in dealing with an unlawful assembly ? and

Fourthly : What are the rights possessed by the members of a lawful assembly when the meeting is interfered with or dispersed by force ?

In 1938 our task must differ somewhat from that undertaken by Dicey. The first question has recently been answered comprehensively by Professor Goodhart<sup>1</sup> in an article which also discusses the kindred matter of processions, apart from the restrictions now imposed by the Public Order Act, 1936.

The second question is now of less importance, for recent practice shows that the police no longer prosecute for unlawful assembly the promoters of meetings or processions as opposed to participants in disturbances caused by strikes and lock-outs.

Thirdly, Dicey speaks of the "rights of the Crown and its servants in dealing with an unlawful assembly." The general issue, namely, the rights of the police to deal with meetings and processions, is the crucial one to-day.

The fourth question, "What are the rights possessed by the members of a lawful assembly when the meeting is interfered with or dispersed by force ?" is still important.

There is another question,<sup>2</sup> namely, "Does there exist any general right of admission to meetings held on private property, such as premises hired for the occasion, so far as meetings advertised as open to the public are concerned ?" This is the point raised by *Thomas v. Sawkins*.<sup>3</sup>

1. (a) *Does there exist any general right of meeting in public places ?* Professor Goodhart attributed the uncer-

<sup>1</sup> *Cambridge Law Journal*, vol. vi (1937), pp. 161 *et seq.*, "Public Meetings and Processions."

<sup>2</sup> See A. L. Goodhart, *Thomas v. Sawkins*, "A Constitutional Innovation," *Cambridge Law Journal*, vol. vi (1936), pp. 22 *et seq.*

<sup>3</sup> [1935] 2 K.B. 249.

tainty of the law to two causes—the limited number of reported cases and the over-simplification in certain text-books. There is a third contributory cause of uncertainty in the fact that the greater part of the cases which are reported start in magistrates' courts as prosecutions for insulting language or behaviour, assault or obstruction of the police in the execution of their duty. Such cases can go no higher than the Divisional Court. It is only by civil proceedings that the issue can be clarified by the Court of Appeal and so far no opportunity has arisen for enabling that tribunal to consider the question. Professor Goodhart's theme is that the legal principles governing public meetings and public processions should be distinguished. He points out that *Beatty v. Gillbanks*<sup>1</sup> was a case of a public procession, not of a public meeting.

The starting-point of every discussion on this topic must be the law relating to user of the highway and it is clear that, in the absence of special licence from the appropriate owner of the highway, no person can claim that he and his fellow-men in unison can exercise their right of passing and repassing along the highway by standing still and making a speech or listening to speeches, as the case may be.<sup>2</sup> It is an offence to obstruct the passage of any footway or other highway: Highway Act, 1835, s. 72. Nor is it any defence to show that the obstruction only affected part of the highway and left clear a way of passage.<sup>3</sup> Nor need the obstruction so caused necessarily amount to a nuisance at common law. The public are trespassing upon the highway in so far as they do more than "pass and repass at their pleasure for the purpose of legitimate travel" including reasonable rest and recreation by the wayside: *Harrison v. Duke of Rutland*; <sup>4</sup> *Hickman v. Maisey*.<sup>5</sup>

Against whom is the trespass committed? The answer

<sup>1</sup> (1882) 9 Q.B.D. 308.

<sup>2</sup> See *Ex parte Lewis* (1888) 21 Q.B.D. 191, at pp. 196-197. Wills, J., treats the right of public meeting as one which has long since passed out of the region of discussion and doubt as being irreconcilable with the right of free passage.

<sup>3</sup> *Homer v. Cadman* (1886) 16 Cox, 420; and see Jennings, *The Law and the Constitution* (2nd ed., 1938), p. 253.

<sup>4</sup> [1893] 1 Q.B. 142.

<sup>5</sup> [1900] 1 Q.B. 752.

to this in urban areas is the highway authority in which the surface of the highway is vested. The term, highway, includes squares and other open spaces repairable by the local authority. But it is obvious that civil proceedings are of little use to check the holding of meetings unless these are duly advertised in advance. The question whether the local highway authority can ask the police to prevent the meeting is answered by the Highway Act. In any case a meeting usually constitutes a public nuisance—by reason of the obstruction which can be shown to have been caused—remediable by indictment or under local by-laws by summary proceedings. Professor Goodhart's conclusions are that every unlicensed public meeting can be regarded as a trespass against the individual land owner or public body in whom the surface of the highway is vested, since the highway can only be used for the purpose for which it has been dedicated. Any other unlicensed use, however desirable it may be from other standpoints, is legally wrongful. If the highway is used for any purpose other than travel, a trespass may be committed even though no one is obstructed and no injury done, but that trespass is against the local highway authority or the owner of adjoining land and not a wrong against the members of the public. So far as they are concerned, the matter is only a wrong if it constitutes a public nuisance or an obstruction under the Highway Act, 1835. The few English cases on this subject are collected in Professor Goodhart's article.<sup>1</sup>

There is, however, an interesting case from Scotland which seems to have escaped most English writers in *M'Ara v. Magistrates of Edinburgh*.<sup>2</sup> A proclamation had been issued by the magistrates prohibiting the holding of meetings in certain Edinburgh streets unless a license to do so had been previously obtained. Penalties were imposed for breach of the proclamation, which purported to be issued under powers conferred by an Act of 1606, having for its object the staying of unlawful conventions. A street orator, who had been convicted for a breach of the proclamation, brought an action for declarator on the ground (*inter alia*)

<sup>1</sup> See especially *The Queen v. Graham and Burns* (1886) 16 Cox, 420.

<sup>2</sup> [1913] S.C. 1039.

that the magistrates had no authority to issue the proclamation and that he was not bound to obey it. The court held that the Act of 1606 was in desuetude and further that the magistrates were not empowered by common law or by any other statute to issue such a proclamation and consequently set aside the conviction. The orator was acquitted on a second charge of a breach of the peace. The case is a good example of the Scots law doctrine of desuetude, which is unknown to our law. Its interest for us lies in the argument that the magistrates have a general power of preventing misuse of the streets and of prohibiting their use for any but primary public purposes, though not by proclamation. The Lord President says,<sup>1</sup> "there is no such thing as a right for the public to hold meetings as such in the streets." In this respect, then, the law of Scotland does not differ from English law. He goes on to discuss the right of passage and says that it is a question of degree what more the public can do in the streets besides passing and repassing. The right of free speech is a perfectly separate thing from the question of where that right is to be exercised. The Lord President declines to generalise as to whether free speech can be exercised in open spaces and public places, but, as regards the streets, he is clear that the magistrates, and not the police, are the judges, though the police are the ministerial officers for executing the magistrates' decisions and moving on members of the public who choose to assemble in defiance of the magistrates.

Another Scottish case of interest is *Aldred v. Miller*<sup>2</sup> which follows *M'Ara's* case in denying a private right to any individual to make use of any public streets for holding meetings, and goes on to say that, if a public meeting is so held, the court must pay due regard to the equal participation of all members of the public in the various uses for which the streets are kept open, of which free and unrestricted passage is the most important but not necessarily the only use. In the case in question there was clear evidence of obstruction contrary to the express terms of a local Police Act in Glasgow.

<sup>1</sup> [1913] S.C., at p. 1073, *per* Lord Dunedin.

<sup>2</sup> [1924] J.C. 117.

In discussing public processions, Professor Goodhart regards a procession as distinct from a meeting as *prima facie* lawful, though even in the case of a procession the right is not an absolute one and depends upon the facts of each particular case as to whether the highway is being used in a reasonable manner. His distinction rests upon this basis—that a procession is passing and repassing, which is an admitted right of members of the public, whereas a meeting is necessarily stationary and therefore constitutes a trespass.

The two Scottish cases cited above apply equally to processions as to meetings and emphasise that a person must not selfishly engross a public right for himself. If, therefore, obstruction is proved as a fact, a procession constitutes infringement of the law just as much as a meeting. The English case of *Burden v. Rigler*<sup>1</sup> shows that a meeting is not necessarily unlawful because it is held upon a highway, but it certainly does not establish any right to meet there.

The position with regard to the police seems to be that, if they can prove that any obstruction is caused, they can prosecute under the Highway Act or similar statutory powers, or indict for public nuisance the promoters of and participants in any public meeting and equally so with a procession held upon the highway. Thus the right is reduced to this: any person may hold a public meeting if he has obtained beforehand the assurance of the local chief officer of police that he will not take proceedings against him on the ground of obstruction. Even so, any member of the public who is inconvenienced in his use of the highway can presumably take proceedings on his own.

But the recent case of *Duncan v. Jones*<sup>2</sup> goes further and seems to show that, even if no obstruction can be established and no trespass be in issue, the police may, on the ground that there is a reasonable apprehension of a breach of the peace by B, C and D if A makes a speech, prevent A from addressing a meeting at which B, C and D are present. This admittedly raises a problem of general application—can A be prevented from performing a lawful act because it is apprehended that B may thereupon commit an unlawful

<sup>1</sup> [1911] 1 K.B. 337.

<sup>2</sup> [1936] 1 K.B. 218.



act? But it affects fundamentally the particular question of whether there can be any meeting at all without police license.

The appellant Duncan, a woman speaker, was told by Jones, an inspector of police, who was present at the proposed place of meeting, that she could not hold a meeting there in N. Street, but could hold it in D. Street, 175 yards away. She thereupon mounted a box saying, "I am going to hold it," was taken into custody without resistance on her part and later charged with and convicted of obstructing the police officer in the execution of his duty. Mrs. Duncan had held a meeting some fourteen months previously at the same spot, which was opposite a training centre for the unemployed. The previous meeting had been followed on the same day by a disturbance inside the training centre which the superintendent of the centre attributed to the meeting. In the intervening months Mrs. Duncan had made several attempts to hold other meetings at the same spot. It was not, however, alleged that on this occasion she caused an obstruction or that she or any of the persons at the meeting had either committed, incited or provoked any breach of the peace. The appeal to quarter sessions was dismissed and a case was stated to the Divisional Court as to whether there was evidence on which quarter sessions could form the opinion upon which the conviction of obstructing the police officer in the execution of his duty could be upheld. Quarter sessions had found:

(1) that in fact (if it be material) the appellant must have known of the probable consequences of her holding the meeting—namely, a disturbance and possibly a breach of the peace—and was not unwilling that such consequences should ensue;

(2) that in fact the respondent reasonably apprehended a breach of the peace;

(3) that in law it thereupon became his duty to prevent the holding of the meeting; and

(4) that in fact, by attempting to hold the meeting, the appellant obstructed the respondent when in the execution of his duty.

Now the point at issue was whether the police inspector had any duty to prevent the meeting. If he had no such



duty, he could not complain of being obstructed in doing that which it was not his duty to do, and he is in the same position as the over-zealous policeman whose action was disapproved in *Beatty v. Gillbanks*,<sup>1</sup> when he arrested the Salvationists because he feared unlawful opposition from another body. No breach of the peace, actual or contemplated as occurring by reason of the present meeting, was in question. Indeed the police suggested a place nearby for holding the meeting. What was feared was a repetition of a disturbance inside the training centre, such as had followed the appellant's meeting held outside fourteen months earlier. The police inspector based his fears upon the opinion of the official in charge of the centre, whose apprehensions would certainly have been material, had the case been one involving a charge of unlawful assembly. But no such charge was in issue, though presumably it would have been brought had there been any grounds for so doing. It is true that it was found as a fact that the appellant must have known of the probable consequences of her holding the meeting, namely, a disturbance, and possibly a breach of the peace, and *was not unwilling (sic)* that such consequences should ensue. But this is equally true of the Salvationists in *Beatty v. Gillbanks*, or, for example, of a Conservative speaker who holds an election meeting in a Communist district where his previous attempts to hold meetings have been broken up in disorder. Both are prepared to risk disturbances which it is the duty of the police to prevent, in the last resort by dispersing the meeting. But Mrs. Duncan neither caused nor apprehended disorder at her meeting. It would thus appear that the common law of England, which rightly penalises the speaker who persists in insulting language and behaviour, *Wise v. Dunning*,<sup>2</sup> has ceased to protect the speaker who merely desires to give expression to his opinions without causing any obstruction or committing, inciting or provoking any breach of the peace.<sup>3</sup>

It is submitted that, not only is there no right to hold a public meeting as the law stands to-day, but every promoter

<sup>1</sup> (1882) 9 Q.B.D. 308; see pp. 274 *et seq.*, *ante*.

<sup>3</sup> [1936] 1 K.B., at p. 219.

<sup>2</sup> [1902] 1 K.B. 167.

of such meeting may have to face what is in effect a double trial :

(i) By an administrative official—a police officer, who can decide beforehand whether he is prepared to allow the meeting to be held. If he is willing to approve the meeting, the courts are unlikely to be troubled with a case against the promoters, though of course proceedings against both onlookers and participants may ensue if disorder actually breaks out, as on the occasion of the march of the British Union of Fascists in South-East London in October, 1937.

(ii) By the courts : possibly if the promoter fails to obtain previous police approval, certainly if he declines to accept police refusal to grant such approval. For the police can intervene not merely on account of a breach of the peace, actual or apprehended, but also may stop a meeting or a procession if it can be shown that it causes an obstruction by interfering with the ordinary use of the highway.

It is not for a lawyer as such, even a constitutional lawyer, to say whether the power of licensing public meetings ought to lie with the police. But the result of the existing law is that it does. As citizens of a democratic State we may pause to inquire whether it would not be better to provide a reasonable measure of free facilities for public meetings, adjacent to the highway or (as at election time) in public buildings for those who wish to air their political views among their neighbours. If free discussion is accepted as an essential liberty, ought the law to permit the police to hamper it as regards the place of its exercise merely on account of suspicions as to probable consequences ?

1. (b) *Public processions*. It is the opinion of those responsible for the maintenance of order that public processions are more likely to provoke opposition of a character harmful to the general public than public meetings. It may be argued that the enactment of the Public Order Act, 1936, gave effect to this opinion. As a matter of law, processions—as distinct from meetings—are *prima facie* lawful, since the participants are severally entitled to pass and repass on the highway provided that no obstruction is thereby caused. But a procession may become unlawful so soon as it causes

an obstruction. The decisions of the Scottish Courts quoted above show that there is no monopoly of the right of passage given to any class of users of the highway. Now it is arguable that, while a public meeting on the highway is a nuisance if it causes (as it must) any obstruction at all, a public procession is not, if in all the circumstances and notwithstanding obstruction of some degree, the user of the highway is reasonable. *M'Ara v. Magistrates of Edinburgh* (*ante*) shows that warning by the police could not merely of itself render the user unlawful; that is a matter for judicial determination by magistrates. There is no English authority where the legality of processions has been considered at length.<sup>1</sup> But if the police warning is based upon a reasonable apprehension that somebody as a result of the procession being held will commit a breach of the peace, it will be an offence under the Prevention of Crimes Acts, 1871 and 1885, to hold the procession, just as it is to hold a meeting, if *Duncan v. Jones* (*ante*) be rightly decided. But this case deals only with apprehensions of disorder arising at the time of assembly. Apart from this the question is one of reasonableness. Provocative conduct by the procession may well result in a riot or, at least, unlawful assembly. There can be no certain test of what is reasonableness. Moreover, to emphasise the distinction between meeting and procession, there is the authority of the Public Order Act which seems to show that the existing state of the law (apart from special Acts of limited application and by-laws of certain districts) for prevention of processions was regarded as inadequate, for s. 3 specifically authorises their prevention. The provisions of the Act relating to meetings, on the other hand, are confined to the prohibition of carrying offensive weapons, offensive conduct at meetings and an amendment of the Public Meetings Act, 1908, and are not concerned with meetings in a public place or highway, as such, at all—presumably because the Home Office regarded the existing law as adequate to enable meetings on the highway to be prevented.

Sir Samuel Hoare<sup>2</sup> has pointed out that the Public Order

<sup>1</sup> Cf. *Lowdens v. Keaveney* [1903] 2 I.R. 82; and *Cambridge Law Journal*, vol. vi (1937), at pp. 171-172.

<sup>2</sup> Letter to *The Times*, 19th June, 1937.

Act stops short of giving him as Home Secretary, or a chief officer of police, or the Commissioner in the Metropolis, any power to prohibit altogether a particular procession in advance of its assembly, though the Home Secretary by s. 3 (2) and (3) may consent to an order limited to three months prohibiting all processions (but not meetings) in a defined area, viz. that of a borough or district council (or part thereof) and in the County of London, the Metropolitan Police District. In the Metropolis the Commissioner of Police is empowered to make an order with the consent of the Home Secretary. Elsewhere the application for prohibition must be endorsed by the appropriate local borough or district council. So far the only orders made have been in the Metropolitan Police District. Thus the law is that the right of public procession, so far as it exists, may be destroyed by administrative action initiated by the police over a specified area for a limited period. The prohibition must be general in its application and not directed to particular gatherings calculated to provoke disorder.

Such being the law, it is clear what those who believe in freedom of speech by means of processions, as with meetings, have to rely upon a reasonable exercise of their powers by the police. Police neutrality, given the best will in the world, is apt to favour the existing order of government which promoters of meetings and processions are often concerned to attack. The prohibited area provisions of the Public Order Act at least have this merit, that they apply impartially to all assemblies in the area in which the Home Secretary's order operates for the time being. But the solution is far from ideal, beneficial though it has proved to be to the inhabitants of some of the poorer quarters of London.

2. *What is the meaning of the term "unlawful assembly"?* The importance of this definition to-day lies in its insistence upon apprehension of a breach of the peace. The definition of what constitutes the misdemeanour of unlawful assembly is now reasonably clear—"An assembly of three or more persons with intent either, (a) to commit a crime by open force or, (b) to carry out any common purpose, lawful or

unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it." The difficulty lies in its application. For it is not always easy to ascertain what amount to circumstances calculated to inspire a breach of the peace, without proof of which this offence, unlike that of criminal conspiracy, cannot be committed. It is, of course, for the courts to determine what is reasonable apprehension, but it is usually for the police to supply the evidence upon which they base the apprehension which has caused them to bring this charge. And the police, alive no doubt to the risk to themselves of inaction, are naturally prone to suspect a breach of the peace when a meeting or procession is being interrupted by a vocal opposition. But it is important in this connection to emphasise that a breach of the peace is not synonymous with a breach of the law. A fight in a public place, an assembly for fighting in a private place, a duel, and a challenge to fight are given as the only examples in Halsbury, *Laws of England*,<sup>1</sup> of breaches of the peace. This is no authority for holding a battle of words as such to constitute a breach of the peace.

Dicey considered that one of the questions which remained open for decision was, "need the breach of the peace, or fear thereof, which gives a meeting the character of illegality be a breach caused by members of the meeting?" His answer was that a meeting lawfully conducted and with a lawful object is perfectly lawful and does not become unlawful from the mere fact that it may cause wrongdoers who dislike the meeting to break the peace. On the other hand a meeting which, because of the illegality of its object or the conduct of its members, does cause a breach of the peace by persons opposed to the meeting, may thereby become an unlawful assembly. An otherwise perfectly lawful meeting, if it in fact causes a breach of the peace on the part of wrongdoers who oppose the meeting, may, if the peace can be restored

<sup>1</sup> *Laws of England*, 2nd ed., vol. x (1933), Arts. 476-478, which do not, however, attempt a definition. Nor does the index to Russell, *Crime* (9th ed., 1936), give any reference to a breach of the peace as such.



by no other means, be required by the magistrates or other persons in authority to break up. Refusal on the part of members of the meeting to disperse in these circumstances constitutes the meeting an unlawful assembly.

It is then the primary duty of the police to preserve order by dealing with disturbances which needs emphasis. It is not for a police officer to take the easier course of prohibiting the continuation of a lawful meeting unless all other steps to prevent a breach of the peace have been taken. Nor, of course, can a meeting be prevented in advance by declaring it unlawful, at all events, until the recent decision of *Duncan v. Jones*—which related to events occurring on the actual occasion of attempting to hold a meeting—turned the flank of *Beatty v. Gillbanks* by enabling the police to arrest would-be speakers under the Prevention of Crimes Acts, 1871 and 1885, on charges of obstructing the police in the execution of their duty.

3. *The rights of the Crown in relation to unlawful assembly.* Dicey's third question was: "What are the rights of the Crown or its servants in dealing with an unlawful assembly?"

The question to-day resolves itself into an examination of the powers of the police in dealing with meetings and processions. So far as statute law is concerned the following list of Acts, though not comprehensive, gives some idea of the wide powers of the police.

(i) 13 Car. II, Sess. 1, c. 5 (1662), is an Act against tumultuous petitions to the King or Parliament, which was not repealed by the Bill of Rights.

(ii) The Riot Act, 1714, provides in substance that if twelve or more persons whose conduct in the opinion of a magistrate is riotous continue together for one hour after he has read to them the proclamation ordering them to disperse, fail to disperse at the expiration of the hour, any force necessary to disperse them may be used and the alleged riotous assembly becomes a felony, if it has not already become so because of the commission of some such act as arson or other malicious damage to property.

(iii) Much of the legislation which was passed between 1790 and 1830 was of a temporary character or has been



repealed. It was largely inspired by the fear of the governing classes lest the events of the French Revolution should be repeated in England. But in addition to the Incitement to Mutiny Act, 1797, there remain on the statute-book the Seditious Meetings Act, 1817, so far as concerns s. 23, which makes meetings of more than fifty persons when Parliament or either House is sitting, unlawful assemblies if held within one mile of Westminster Hall, and the Unlawful Drilling Act, 1820, aimed solely against meetings for drilling and arming. Within the last few years two speakers were charged under the former Act with disturbing the peace and as inciters of persons to take part in mass demonstrations which were calculated to involve a contravention of the provisions of the Act.

(iv) Highway Act, 1835, s. 72, makes it an offence to obstruct the passage of any footway or other highway. It is no defence that part of the highway is left clear for the passage of other users : *Homer v. Cadman*.<sup>1</sup>

(v) In the Metropolitan s. 52 of the Metropolitan Police Act, 1839, empowers the police to make regulations as to routes and to prevent obstruction of streets and thoroughfares within the Metropolitan Police District on the occasion of public processions. Section 54 of the same Act imposes a summary penalty for the use of threatening, insulting or abusive words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned in any thoroughfare or public place. The Town Police Clauses Act, 1847, which since the Public Health Act, 1875, s. 171, has applied to all Urban Districts (outside the Metropolitan area), empowers the police to make orders for preventing obstruction in the streets during public processions, rejoicings, illuminations, and in any case when the streets are thronged. This Act contains a power of arrest without a warrant of any person found committing any offence under the Act, whether punishable upon indictment or upon summary conviction. Section 28 creates a large number of offences relating to obstruction, annoyance or danger to residents or passengers in any streets. Amongst

<sup>1</sup> (1886) 16 Cox, 420.

other offences are those of placing or leaving . . . any cask, tub, basket, pail or bucket . . . or placing or using any standing place, stool, bench, stall or showboard on any footway. These provisions seem to hinder the activities of the tub-thumper. Moreover, the use of profane or obscene language in any street is also punishable. There are in addition a variety of Acts which enable local authorities to place restriction by means of by-laws upon the use of public open spaces, such as recreation grounds. By the exercise of such powers restrictions may be placed upon the holding of public meetings.

(vi) In cases where serious disorder results in damage to property owing to the activities of a meeting, the Malicious Damage Act, 1861, makes it a felony to demolish or pull down or destroy property, or to begin to do any of these things. The Act also creates many other offences relating to injury and destruction to property. Under this head should also be mentioned the Riot Damages Act, 1886, which requires the ratepayers to make compensation to individual property owners whose premises have been injured or destroyed.

(vii) More especially concerned with meetings, as such, is the Public Meetings Act, 1908, as amended by the Public Order Act, 1936, s. 6, which imposes a penalty on the breaking up of a public meeting and gives the police power upon reasonable suspicion to take, at the request of the chairman, the name and address of any person who acts in a disorderly manner at the meeting. The Act, as amended, contains a power for the police to arrest any person suspected of committing any offence under the Act who refuses to give his name and address to the police; a constable may also arrest him without a warrant if he reasonably suspects such person of giving a false name and address.

(viii) Finally, there are the provisions of the Public Order Act, 1936, which, in addition to prohibiting the use of uniform in connection with political objects and prohibiting quasi-military organisations, gives the police power to give such directions to the organisers of processions as they may think necessary for the protection of public order, including

conditions prescribing the route and prohibiting the entry to any public place specified in the directions, s. 3 (1). The wider powers of this section, which enables a general prohibition on all meetings in defined areas for a period not exceeding three months to be imposed, have already been noticed. Section 4 prohibits the carrying of any offensive weapons at public meetings and processions. Section 5 makes applicable to any public place or any public meeting the existing prohibition under the Town Clauses Act on the use of threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace. Actually, this does not seem to add much to the existing state of the law—at all events as regards street meetings and processions. The earlier legislation, which was enacted in an age when Governments feared revolution, rather than disorder, is not in practice enforced to-day. Its retention on the statute-book does, however, invest the authorities with power to impose restrictions of unnecessary severity, should the decision to enforce the letter of the law be taken in times of political crisis.

The civil remedies of trespass and nuisance which were discussed in the first part of this note are not in practice available to the police, and indictment for a public nuisance is too clumsy a weapon. There remain a number of criminal offences which may apply in the circumstances of a particular meeting, such as criminal libel and the various offences comprehended under the title of sedition, blasphemy, obscenity, unlawful assembly, rout and riot. Of these it is seldom that any offences are charged other than unlawful assembly and common law riot. Recent practice seems to indicate that, although the police may bring charges of these crimes, in the case *e.g.* of demonstrators at a pit-head during a colliery strike, they use other weapons to impede the conduct of meetings where they deem it desirable to intervene. In the twelve months prior to July, 1937, there were 320 prosecutions arising out of public meetings and processions. The bulk of these cases were charges of insulting behaviour, obstructing the police or assault. In only 27 cases were sentences of imprisonment imposed.<sup>1</sup> *Duncan v. Jones* obviates the

<sup>1</sup> H. of C. Debates, vol. 326 (1937), col. 350.

necessity of proving that a meeting is unlawful before it can be dispersed. *Thomas v. Sawkins* gives the police the right of entry to any meeting to which the public is admitted. And who will question but that the presence of the police may be a powerful deterrent to free discussion of, at all events, political matters?

Finally, there is a power vested in justices of the peace to control the holding of public meetings indirectly by making orders binding over the promoters and others to keep the peace, or alternatively be of good behaviour. This long established power of obscure origin is recognised in *Lansbury v. Riley*.<sup>1</sup> Possibly it rests upon the statute of 1360; possibly it is a common law power implicit in the commissions held by justices of the peace. Presumably the power cannot be invoked to restrain the holding of meetings which have a lawful object solely on the ground that the opponents of the promoters may commit breaches of the peace if the meeting is held. But it is not necessary to prove that any individual person goes in bodily fear in order to obtain an order for entry into surety for good behaviour. It may be remembered that the advertised speakers at meetings in connection with the hunger marches of a few years ago were required to enter into such sureties in advance of the meetings. It is, of course, true that the duty to exercise this power lies with the magistrates and not with the police. But it would seem difficult for any bench of magistrates to refuse the application made by a responsible police officer who stated his *bona fide* reasons for objecting to a meeting, whether on the grounds of an apprehended breach of the peace, or the past reputation of an advertised speaker.

In brief, it would seem that the statute law, even before the Public Order Act, was adequate to enable the police to control actual disorder at meetings. The Act admittedly gives them greater power with regard to processions, in that they may now persuade the appropriate authority to prohibit all processions for a space of time in a given area, but otherwise it seems to add little to the existing state of the law so

<sup>1</sup> [1914] 3 K.B. 229.

far as actual meetings and processions are concerned. The ordinary range of criminal offences, with the possible exception of unlawful assembly, lie dormant : the modern practice is to impede the holding of meetings which come under a police ban by charges brought under the Prevention of Crimes Acts or for insulting behaviour or assault, or by applications to bind over the promoters in advance to be of good behaviour. These powers, coupled with the power of entry recognised in *Thomas v. Sawkins*, enable the police to control and, if need be, to prevent the holding of meetings.

4. *What, finally asks Dicey, are the rights possessed by members of a lawful assembly when the meeting is interfered with or dispersed by force?* The answer to this question is of general application, though strictly it ought only to apply to public meetings held off the highway in some place such as a hired hall where questions of trespass, obstruction and nuisance do not arise. But in practice organised meetings and processions are permitted to take place in or near the highway and therefore the rights of the promoters of such assemblies, if the proceedings are interrupted by opponents or dispersed by force, do not differ from those of promoters of indoor activities.

The Public Meetings Act, 1908, as amended by the Public Order Act, 1936, s. 6, affords some measure of statutory protection. *Burden v. Rigler*<sup>1</sup> shows that it is no defence to a charge under the Act of disorderly behaviour at a public meeting to plead that the meeting was unlawful simply by reason of the fact that it was held on the highway. This does not, of necessity, make a meeting unlawful; each case is a question of the reasonableness of the user of the highway in the particular circumstances.

The Public Meetings Act is not, however, a particularly effective measure. Prosecutions under it are rare. But it does, as amended by the Public Order Act, give a weapon to a chairman which he may use effectively if there are police present at the meeting. For, as we have just seen, it is now within the chairman's power to request the police (but not private stewards) to take the name and address of a

<sup>1</sup> [1911] 1 K.B. 337.



person suspected of acting in a disorderly manner and the police are empowered to arrest any one who refuses to give his name and address or who is suspected by the constable of giving a false name or address.

Apart from this enactment it is clearly the duty of the police to preserve order. Whether or not they are invited to attend a meeting the preservation of the peace is their paramount duty, as the Bristol Riot Case of 1831 shows; and *Thomas v. Sawkins* gives them a right of entry to a meeting even against the wishes of the promoters. Once the police are present, it is their duty to take all possible steps for the preservation of order. But a meeting convened for a lawful object must not be dispersed in order to prevent opponents interrupting unless and until it is plain that by no other means can the peace be preserved. For this there is judicial authority both in *Beatty v. Gillbanks* and the Irish Case of *The Queen v. Justices of Londonderry*,<sup>1</sup> as qualified by *O'Kelly v. Harvey*.<sup>2</sup> Field, J., in *Beatty v. Gillbanks*, said: "What has happened here is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for this proposition."

Holmes, J., in *The Queen v. Justices of Londonderry*, referring to *Beatty v. Gillbanks*, said: "The principle underlying the decision seems to me to be that an act innocent in itself done with innocent intent, and reasonably incidental . . . generally in the exercise of a legal right does not become criminal because it may provoke persons to break the peace or otherwise to conduct themselves in an illegal manner."

The remedy is clearly the presence of sufficient force (whether of police or private stewards) to preserve order. Only in the last resort, as *O'Kelly v. Harvey* shows, should the step of dispersing the meeting be taken by magistrates

<sup>1</sup> (1891) 28 L.R. Ir. 440.

<sup>2</sup> (1883) 14 L.R. Ir. 105.

<sup>3</sup> (1882) 9 Q.B.D., at p. 314. See p. 275, *ante*.

<sup>4</sup> At pp. 461-462.



or the police—that is if all other means, such as the arrest or dispersal of interrupters, the strengthening of the numbers of stewards or of the police present, have failed ; then, and only then, should a lawful meeting be dispersed. If the promoters and their sympathisers have already come to blows with the opponents, the meeting can at once be dispersed, for it has ceased to be lawful. But it is obvious that the mere presence of the police will normally reduce the prospects of such a conflict. If it does not, the armoury of the criminal law which we have already inspected provides a choice of weapons, though none of these will mend the broken heads and frayed tempers.

It is not, of course, a desirable state of affairs that the surest way to enjoy freedom of speech is to post a policeman or two at the door, and there are meetings with perfectly legitimate objects where the presence of the police would tend to restrict rather than to preserve free expression of opinion. For many speakers think that a policeman is apt to interpret fair criticism of authority as justifying an apprehension of a breach of the peace. The only course open to those who feel this objection is to provide their own bodyguard of stewards, if opposition is feared. But this, though used by the police as an excuse for not interfering with the activities of stewards inside a building where a Fascist meeting was being held in 1934, will no longer ensure privacy from police supervision. For it must be repeated that *Thomas v. Sawkins*<sup>1</sup> has given the police a right of entry, and since they now have such a right, it is obviously to be exercised whenever disorder is to be feared. No longer can the police (if indeed they ever could) stand outside a hall and collect the interrupters as they are deposited in the streets by private stewards.

The remaining question is—whether a distinction can be drawn between two such cases as the following :

- (i) A Conservative speaker organises a meeting in a district hostile to his party, knowing that outsiders will, as on previous occasions, certainly try to break up his meeting.
- (ii) A Fascist at a meeting uses terms which are insulting, but not in themselves unlawful, directed against Jews, many

<sup>1</sup> See 573, *post*.

of whom are present, knowing that because of his remarks fights are likely to follow.

Both speakers may be assumed to be addressing meetings which have been properly convened in places where no trespass, nuisance or obstruction is in question.

As to the Conservative speaker, he is in a position covered by the decision in *O'Kelly v. Harvey*. The object of his meeting and the conduct of his supporters are, one may assume, strictly lawful. But if the meeting provokes either a breach of the peace, or a reasonable belief in those responsible for the maintenance of order in the district, whether magistrates or police, that a breach is inevitable, the meeting may be dispersed. Such a situation may usually, though not always, be avoided by the presence of police at the meeting.

The Fascist will probably find himself in the position of the defendant in *Wise v. Dunning*,<sup>1</sup> because insulting behaviour, even if it involves the utterance of words which are not in themselves unlawful, amounts to unlawful conduct. He may thus be summoned before magistrates, who may require him to enter into sureties for good behaviour, as well as be prevented by the police on the spot from continuing his address. He may be left to this fate, for the law regards the infirmity of human temper to the extent of considering that a breach of the peace may be the natural consequence of insulting or abusive language or conduct.<sup>2</sup> The Conservative speaker is clearly in the stronger position. He may not succeed in delivering his speech. He can at least ensure that the police help him to obtain a hearing, and he will not run any risk of unlawful conduct on his part if they fail and he then abandons the meeting.

5. *Does there exist any general right of admission to meetings in public places?*<sup>3</sup> Arising out of the failure of the Metropolitan Police to enter Olympia on June 7, 1934, notwithstanding that there were reasonable grounds for believing that breaches of the peace would occur, because the organisers

<sup>1</sup> [1902] 1 K.B. 167; K. & L. 357.

<sup>2</sup> *Wise v. Dunning* [1902] 1 K.B., at pp. 179-180; cf. *The Queen v. Burns* (1886) 16 Cox, 355.

<sup>3</sup> See A. L. Goodhart, *Thomas v. Sawkins*; "A Constitutional Innovation," *Cambridge Law Journal*, vol. vi (1936), pp. 22 et seq.

of a meeting did not wish to admit them, the Home Secretary told the House of Commons that "the law provides that, unless the promoters of a meeting ask the police to be present in the actual meeting, they cannot go in, unless they have reason to believe that an actual breach of the peace is being committed in the meeting."<sup>1</sup> The occasion was that of a Fascist meeting where the stewards of the promoters dealt severely with dissentients in the audience without police assistance. *Thomas v. Sawkins*<sup>2</sup> showed that the Home Office view of the law was incorrect, and that the police have the right to be present at such a meeting to prevent the commission of a misdemeanour or breach of the peace where such might reasonably be anticipated. The case arose out of a technical assault committed by a police officer who with his superior officer declined to leave a public meeting held upon private premises after an attempt had been made to refuse admission to them as police officers. The meeting was convened to protest against the Incitement to Disaffection Bill then before Parliament and to demand the dismissal of the Chief Constable of the County (Glamorgan). The public were invited to attend the meeting without payment. It was not alleged that any criminal offence had been committed by any person at the meeting at any time nor that any actual breach of the peace or disorder had occurred. The justices were of opinion that the police officers had reasonable grounds for believing that, if they were not present at the meeting, there would be seditious speeches and other incitements to violence, and that breaches of the peace would occur; that they were entitled to enter and remain in the hall and meeting; and that in consequence the respondent did not unlawfully assault the appellant, one of the promoters of the meeting. The Divisional Court dismissed the appeal on a case stated. Lord Hewart, C.J.,<sup>3</sup> expressed the opinion that the police have power to enter and to remain on private premises when they have reasonable grounds for believing that an offence is imminent or is likely to be committed. He did not restrict his statement to offences which involved a breach of the

<sup>1</sup> H. of C. Debates (1933-34), vol. 290, col. 1368.

<sup>2</sup> [1935] 2 K.B. 249.

<sup>3</sup> [1935] 2 K.B., at p. 255.

peace. But Avory, J., referring to the many statutes which have given the police express power of entry, stated that they were all cases in which a breach of the peace was not necessarily involved and that it therefore required express statutory authority to enable the police to enter. The latter view seems the correct one, as Lord Hewart's view would seem to negative any need for statutory authorisation.

Granted that the finding of the justices in this case was correct, and that there were reasonable grounds for apprehension of a breach of the peace, there is not of necessity any element of disorder or breach of the peace in a seditious speech, though prosecutions for this offence are rare unless there is incitement to violence.<sup>1</sup> The objects of the meeting in *Thomas v. Sawkins* suggested no such incitement, nor would meetings designed to bring about the fall of a Government by a general stay-in strike, which would clearly come within the definition of sedition. Yet, as Professor Goodhart points out, both Lord Hewart and Avory, J., may be cited as authority for saying that the police are entitled to enter private premises because they reasonably believe that "if they were not present, seditious speeches would be made and/or that a breach of the peace would take place."<sup>2</sup> The report continues, "To prevent any such offence or a breach of the peace the police were entitled to enter and to remain on the premises. . . ."

There is no authority in the text-books for extending the power of entry beyond felonies or breaches of the peace apart from statutory authorisation.<sup>3</sup> It would thus seem that the case has resulted in an extension of the common law which enables the police to enter private premises on the occasion of a public meeting if they believe that any offence is likely to be committed, whether or not it is one which endangers the public peace. It is, however, to be remarked that *Thomas v. Sawkins* is the only direct authority for extending the power of entry to the misdemeanour of

<sup>1</sup> For definitions of sedition see pp. 239, 240, *ante*; Kenny, *Outlines of Criminal Law* (15th ed.), pp. 323, 324, citing Stephen, *Digest of Criminal Law* (ed., 1926), Arts. 123-126.

<sup>2</sup> [1935] 2 K.B., at p. 256, *per* Avory, J.

<sup>3</sup> See *Cambridge Law Journal*, vol. vi (1936), pp. 29-30.

sedition. It is, therefore, possible to argue that, rejecting the dictum of Lord Hewart, it does not apply to other misdemeanours which do not involve a breach of the peace. But the law is left in so doubtful a state that Professor Goodhart's plea for a clear statement is irresistible.

There is a wider aspect of the case as it affects liberty of discussion. It was part of the argument of the appellant that the entry by the police constituted a trespass. The point was an obvious one to take, in view of the opinion which the Home Office had lately stated as to the legal position. Lord Hewart rejected this contention by saying that the police were entitled to attend as members of the public and therefore were present by reason of the open invitation to attend which was addressed to all members of the public. Inasmuch as the promoters specifically asked the police officers to withdraw, the invitation was thereby rescinded and the officers ceased to be invitees or even licensees. It should be clear that, if a man invites a number of people to his house, he can subsequently cancel the invitation as regards a particular individual and eject him with reasonable force if he declines to leave, at all events if the individual has not paid for admission. Previous authority supported this view<sup>1</sup>—that of *McCardie, J.* But *Thomas v. Sawkins* is of equal authority as the decision of a Divisional Court. This court has, however, shown that it is not prepared to extend the police power of entry into private premises to cases of belief that a summary offence not involving a breach of the peace has been committed, even if the offence be one committed on the adjacent highway. In *Davis v. Lisle*<sup>2</sup> the employer of two garage hands had been convicted of assaulting a police officer in the execution of his duty. The officer had entered the employer's garage to make inquiries as to an alleged obstruction which he believed to have been caused by the employer's servants leaving a lorry on the highway. He held no warrant to enter nor had he obtained permission from the employer, who told him to leave his garage. The alleged assault was com-

<sup>1</sup> *Cl. Said v. Bull* [1920] 3 K.B. 497, *Salmon L. F. Ct.* 8th ed., 1936, p. 262.

<sup>2</sup> [1920], 2 K.B. 434

mitted in resisting the claim of the officer to remain. The court, which again included Lord Hewart, held that the officer became a trespasser as soon as the appellant requested him to leave and therefore was not from that point onwards acting in the execution of his duty. Accordingly the employer could not be convicted of assaulting or obstructing him in the execution of his duty.

The effect of this uncertainty of the state of the law is that, if the promoter of a meeting can show that he and his audience can only be suspected of committing summary offences involving no breach of the peace, he can resist the presence of the police, if they choose to attend the meeting. Once it can be shown that a single policeman reasonably believed that seditious speeches (according to Lord Hewart *any offence*), whether or not accompanied by breaches of the peace, were about to be delivered, his entry cannot be barred, even if no offence is actually committed. It is easy to see that such a power in the hands of a chief constable may on occasions be used without scruple. At all events the law has moved a long way from Dicey's conception of liberty being guaranteed because no man can be punished unless he has committed some definitely assignable legal offence.<sup>1</sup> In effect, as Professor Goodhart suggested, the power to bind over a person either to keep the peace or to be of good behaviour, hitherto the exclusive function of the magistrate, is now shared by him with the policeman, so far as the conduct of meetings is concerned.

## (2) THE LAW RELATING TO LIBERTY OF DISCUSSION

### (A) *General*

After examining in outline the law of libel, sedition and blasphemy Dicey concluded that "freedom of discussion is, then, in England little else than the right to say anything which a jury consisting of twelve shopkeepers think it expedient should be said or written."<sup>2</sup> He then proceeded

<sup>1</sup> P. 248, *ante*.

<sup>2</sup> P. 246, *ante*.



to consider whether there is a separate law of the Press. There is no censorship, no special tribunal to try Press offences; the jury therefore determines the liability of an organ of the Press by reference to the ordinary law of defamation.

That the Press enjoys certain privileges and is subject to certain restrictions may be admitted. But the effect of these is less formidable than might be supposed from a bare enumeration of special Press law. What is important is to note the severity of the general law which may be invoked to stifle liberty of discussion if it came to be applied in its entirety. It is therefore necessary to supplement Dicey's outline of the law of defamation, just as it has been shown that freedom of public meeting does not rest exclusively, or even principally, upon avoiding the commission of the misdemeanour of unlawful assembly or the more serious offences against public order.

From the days of Elizabeth printed matter was licensed before publication. Printing was then and continued until after 1688 to be the monopoly of members of the London Stationers' Company. At an earlier date printing presses had come under the supervision of the Star Chamber. When in 1693 Parliament renewed for a final period of two years the Licensing Act, the lapse of the Act in May, 1695, cannot be attributed to any vigorous public demand for a free Press. The causes of the failure to renew the Act were rather the exactions of the Stationers' Company and the eccentricities of licensing officials.<sup>1</sup> The result was that for the future the law of libel controlled the liberty of the Press. That branch of law developed in a period when it was considered that all authority had been delegated to the ruler and consequently comment on his actions was libellous.<sup>2</sup> As the Government of the day came in the eighteenth century to be substituted for the Monarch, the restriction upon liberty of discussion which such conception of authority made possible was

<sup>1</sup> See Dawson, *The Law of the Press* (1927), for a short account of the history of Press law.

<sup>2</sup> Holdsworth, *History of English Law*, vol. vi (1924), p. 377; vol. viii (1926), p. 341; vol. x (1938), p. 673.

opposed to all ideas of political criticism.<sup>1</sup> It was, moreover, not until later in the century (1771) that Parliament abandoned its claims to prevent publication of debates. It was still in 1765 contempt of court to publish without licence of the judge a report of legal proceedings, even as a law report for the use of lawyers.<sup>2</sup>

The administration of the law of libel differed from the general rule of administration of the criminal law, in that a verdict on the general issue was not allowed to juries, who were asked to find a verdict only as to the fact of publication and the truth of any innuendo. It was, despite the exceptional precedent of the *Case of the Seven Bishops*,<sup>3</sup> for the judges to decide in cases of seditious and other libellous publications the issue of libel or no libel as a matter of law. Judges, then as now, were prone to be conservative in their outlook and it was not difficult to convict political extremists of sedition. The enactment of Fox's Libel Act, 1792, the sequel to a long judicial controversy as to the function of judges in administering the law of libel,<sup>4</sup> enabled the jury in a prosecution for criminal (including a seditious) libel to return a verdict on the general issue. The measure coincided with the fears of revolution spreading across the Channel. At first convictions of political pamphleteers were as readily obtained from "twelve shopkeepers" as from a bench of judges bent upon repression, but later the new machinery established liberty of discussion within the framework of the common law with little further assistance from the legislature. It is only in times of crisis, when men's passions run high and reason is blurred, that the jury is as a rule willing to convict of seditious or other forms of criminal libel those who seek to disturb the existing order of government by attacking its defects and abuses. The offence of sedition is indeed seldom made the subject of a prosecution in the absence of incitement to violence, though the breadth of its definition remains unaltered. Juries are apt to refuse conviction when

<sup>1</sup> But cf. Holdsworth, *History of English Law*, vol. x (1938), p. 72. Walpole could claim that his Government punished few political libels, despite much provocation.

<sup>2</sup> Dawson, *op. cit.*, p. 2.

<sup>3</sup> (1688) 12 St. Tr. 183.

<sup>4</sup> Holdsworth, *History of English Law*, vol. x (1938), pp. 676-688.

they are convinced of the unsuitability of the law. In the case of *The King v. Aldred*<sup>1</sup> there is to be found in the charge of Mr. Justice Coleridge to the jury a summary of the law of seditious libel which represents the modern attitude to this offence :

You are entitled to look at all the circumstances surrounding the publication with a view to seeing whether the language used is calculated to produce the results imputed ; that is to say you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines might produce a different result if used before an excited audience of young and uneducated men. You are entitled to take into account the state of public feeling. Of course there are times when a spark will explode a magazine. . . . A prosecution for seditious libel is somewhat of a rarity. It is a weapon that is not often taken down from the armoury in which it hangs, but it is a necessary accompaniment to every civilised government. . . . The expression of abstract academic opinion in this country is free. A man may lawfully express his opinion on any public matter, however distasteful, however repugnant to others, if of course he avoids defamatory matter or if he avoids anything that can be characterised either as blasphemous or as an obscene libel. Matters of State, matters of policy, matters even of morals—all these are open to him. He may state his opinion freely, he may buttress it by arguments, he may try to persuade others to share his views. Courts and juries are not the judges in such matters. For instance, if he thinks that either a despotism or an oligarchy, or a republic, or even no government at all is the best way of conducting business affairs, he is at perfect liberty to say so. He may assail superstition, he may attack governments, he may warn the executive of the day against taking a particular course. . . . He may seek to show that rebellions, insurrections, outrages, assassinations and such like are the natural, the deplorable, the inevitable outcome of the policy which he is combating. All that is allowed because it is innocuous, but on the other hand if he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then whatever his motives, whatever his intentions, there would be evidence on which a jury might, on which I think a jury ought, to decide that he is guilty of a seditious publication.

<sup>1</sup> (1909) 22 Cox C.C. 1.

It is, therefore, not helpful to quote the precedents of the eighteenth and early nineteenth centuries for an understanding of the scope of the offence to-day. The same is true of the offence of blasphemy. To-day even the fundamentals of religion may be attacked, if the decencies of controversy are observed, without a person being guilty of blasphemous libel,<sup>1</sup> but there are plenty of precedents of an earlier date to the contrary.

The law relating to obscene publications dates, like the law of blasphemy, from a less tolerant age. There is to-day some danger of its application being used to prevent the publication of scientific, literary and artistic material which by modern standards is unobjectionable. In order to determine whether a publication is an obscene libel it is necessary to consider whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.<sup>2</sup> There is no need to prove an intent on the part of the publisher to corrupt public morals; nor do praiseworthy motives form a sufficient defence. On the other hand, matter which is *prima facie* obscene may be legally published if it is for the public good as being necessary or advantageous to religion, science, literature or art, provided that the manner and extent of publication do not exceed the requirements of the public good. If the question of corruption of morals was always one for the jury, there would be less ground for complaint of convictions which seem to be oppressive. But the Obscene Publications Act, 1957, confers summary powers of search, seizure and destruction upon any two justices of the peace or a single stipendiary magistrate. The provisions of this Act may be summarised as follows :

If upon complaint that there is reason to believe that any obscene books, etc., are kept in any house or other place, for the purpose of sale or distribution, and upon proof that one or more of such articles has been sold or distributed in connection with

<sup>1</sup> See especially *Bowman v. Secular Society* [1917] A.C. 406, and *The Queen v. Ramsay and Foote* (1883) 48 L.T. 733.

<sup>2</sup> *The Queen v. Hicklin* (1868) 3 Q.B. 360, at p. 371.

such place, justices may, upon being satisfied that such articles are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, order by special warrant that such articles shall be seized, and after summoning the occupier of the house, the same or other justices may, if they are satisfied that the articles seized are of the character stated in the warrant, and have been kept for the purposes aforesaid, order them to be destroyed.

It is questionable whether such powers ought ever to be entrusted to a single magistrate or two justices of the peace whose judgment through bigotry or ignorance may thus imperil the distribution of scientific or other knowledge. The censorship of the police court may well be incompatible with public opinion upon standards of morality.

To ensure the safety of the State the Administration possesses ample powers under the Official Secrets Acts, 1911 and 1920, which are primarily, but not exclusively, directed to the prevention of espionage and the wrongful communication of information calculated to prejudice the safety of the State if communicated to a potential enemy. These enactments are in fact framed in the widest terms to prevent the publication of any matter which is detrimental to the public interest. They contain some provisions which are capable of being used to stifle freedom of discussion. But abuse of these provisions is to some extent safeguarded by the requirement of consent to a prosecution by the Attorney-General. The avowed object of the Acts is not, of course, to control the liberty of the Press or to restrict discussion of matters of political interest, but to prevent the betrayal to a potential enemy of matters relating to national defence. By the Official Secrets Act, 1911, s. 2 (1), "if any person having in his possession or control . . . any information . . . which has been entrusted in confidence to him by any person holding office under His Majesty . . . (a) communicates the . . . information to any person other than a person to whom he is authorised to communicate it . . . that person shall be guilty of a misdemeanour." It will be observed that the offence may be committed without the betrayal of any secret, that the information need not relate to matters of



national importance and that the truth or public interest in the information is immaterial. Moreover a policeman, since he takes an oath of office and is under a duty to preserve the King's peace, is a person holding office under His Majesty, with the result that a newspaper reporter may be convicted under the Act for reproducing as news in his paper information relating to a crime of no public interest which he may have obtained from a constable in confidence. By the Official Secrets Act, 1920, s. 6, it is a misdemeanour to refuse on demand by an officer of police not below the rank of inspector to disclose the source of such information: *Lewis v. Cattle*.<sup>1</sup>

Nor does publishing or receiving information of this character render only newspaper reporters liable to prosecution. Cabinet Ministers, Civil Servants, private Members of Parliament, public speakers and journalists who comment upon governmental matters all come under the ban.<sup>2</sup> Nor is the power of interrogation the only drastic power conferred on the Administration. The Acts contain wide powers of search upon suspicion; these are not confined to the issue of search warrants by judicial process. For where it appears to a superintendent of police that the case is one of great emergency and that in the interests of the State immediate action is necessary, he may by a written order authorise the search of premises and persons found therein on suspicion.<sup>3</sup> There would be difficulties of definition if the powers of police interrogation conferred by the Acts were confined to cases of actual or suspected espionage, sabotage and other acts of commission endangering the

<sup>1</sup> [1938] 2 K.B. 454; the case provoked something like consternation among journalists. The Attorney-General gave the House of Commons an assurance that the power of interrogation would not be abused in the future.

<sup>2</sup> These words were written in April, 1938. In June of that year the application of this section to a Member of Parliament who refused to disclose the source of information upon which he based a parliamentary question was considered by the Attorney-General. The incident led to the appointment of a Select Committee of the House of Commons on the question of the applicability of the Official Secrets Acts to Members in the discharge of their parliamentary duties: *Parl. Deb. (H. of C.)*, vol. 337 (1938), cols. 1534-1540.

<sup>3</sup> Official Secrets Act, 1911, s. 9 (2).



safety of the State. But as they stand the Acts confer drastic and exceptional powers of the widest character which are capable of being used to prevent the Press and its contributors as well as Members of Parliament from commenting upon affairs of public interest.

There are two statutes, the Incitement to Mutiny Act, 1797, and the Incitement to Disaffection Act, 1934, which are directly aimed at preventing the seduction, by whatever means, of the armed forces from their duty or allegiance. Publications calculated to cause disaffection among the police are prohibited by the Police Act, 1919. The Aliens Restriction (Amendment) Act, 1919, prohibits an alien from causing disaffection among the civilian population as well as among the armed forces of the Crown and those of its allies, and punishes summarily the promotion of, or the interference in, an industrial dispute by an alien in any industry in which he has not been engaged for at least two years immediately preceding in the United Kingdom. Of these measures the Act of 1934, which was intended to provide a less harsh penalty than the severer measure of 1797, was drawn in terms which aroused a storm of protest at the time of its introduction as a Bill. In consequence it was considerably amended during the course of its passage through Parliament, but it still contains stringent provisions for the prevention and detection of the main offence of seducing a member of the forces from his duty or allegiance. In addition to wide powers of search on suspicion, which may, however, only be authorised by a High Court judge, it is an offence for any person with intent to commit or to aid, counsel or procure the commission of the main offence to have in his possession or under his control any document of such a nature that the dissemination of copies thereof among members of His Majesty's forces would constitute that offence. Offences under the Act are punishable summarily as well as on indictment. Even in its final form the measure may be regarded as going a long way towards arming the Administration with a weapon to restrict the distribution of political propaganda, and of pacifist literature in particular.

These statutes show that there are risks which are not

contained in the law of libel for those who seek to advocate a hostile policy by written or spoken word among the servants of the Government. But prosecutions are rare and juries reluctant to convict. A more formidable menace to freedom of discussion is to be found in the practice of the police in preventing the distribution of literature without being under the necessity of proving that the contents infringe any provision of the law. It follows from the wider powers of the police to prevent obstruction of the highway, even if it be only partial,<sup>1</sup> that the police are in a position to prevent the distribution of leaflets on the highway. They may request the distributor to "move on," even if he is not suspected of causing a breach of the peace. Resistance may lead to a charge of obstructing the officer in the execution of his duty.

There is, however, no power to seize a stock of literature, though this statement must be qualified by numerous statutory exceptions which in particular enable the issue by magistrates, and in some cases of urgency by senior police officers, of search warrants for the seizure of seditious literature and obscene or blasphemous literature and pictures. The common law rule which prohibits the issue of general search warrants was established in the *General Warrant Cases* arising out of the attempt to stifle the political activities of John Wilkes. Two of the three famous decisions related to political literature. *Wilkes v. Wood*<sup>2</sup> decided that papers could not be seized on a warrant which did not name the person whose property was to be searched, while in *Entick v. Carrington*<sup>3</sup> it was held that a warrant directing the seizure of the papers in general of a named person was illegal. Even the statutory power of search and seizure contained in the Official Secrets Act, 1911, s. 9, stops short of authorising the seizure of anything which is not evidence of an offence under the Act having been committed, but it does enable a superintendent of police to issue the search warrant in cases which are in his opinion of great emergency calling for immediate action in the interests of the State.

<sup>1</sup> See App. sec. ii (1), *ante*.

<sup>2</sup> (1763) 19 St. Tr. 1153.

<sup>3</sup> (1765) 19 St. Tr. 1030; K. & L. 145.

The immunity from police interference which is qualified by the statutory powers of search received a further check in *Elias v. Pasmore*,<sup>1</sup> where it was held that upon the occasion of the arrest by warrant of an accused person the police can search the premises where the prisoner is at the time of his arrest and seize material which is relevant to the prosecution for *any* crime of *any* person, and not merely of the person arrested. This decision purported to be based upon the common law. If it is followed, it seriously diminishes the protection afforded by the rule established in *Entick v. Carrington* (*ante*). It does not, however, justify the wholesale seizure of the contents of the premises, except so far as any of those contents are evidence of the commission of an offence by someone.

### (B) *Press Law*

"In truth there is little in the statute-book which can be called a press law."<sup>2</sup> The last edition qualified this statement by a note referring to a critic's assertion that there was slowly growing up a distinct law of the Press and citing three statutes of the nineteenth century, Lord Campbell's Libel Act, 1843, the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888. Here it is proposed to examine the present extent of a separate Press law and to consider whether its cumulative effect is to subject the Press to more restrictions than members of the public with regard to freedom of discussion. By "Press" is meant generally, though not exclusively, newspapers and periodicals.

Apart from special statutory regulation of the Press, there is little doubt that there are certain aspects of the law of libel which operate with severity upon the Press and the public alike. The rule in *Hulton v. Jones*<sup>3</sup> excludes the defence that at the date of publication the defendant had no reasonable grounds for supposing that the words complained

<sup>1</sup> [1934] 2 K.B. 164. See E. C. S. Wade, "Police Search," in *Law Quarterly Review*, vol. 1 (1934), pp. 354-367.

<sup>2</sup> See p. 240, *ante*.

<sup>3</sup> [1910] A.C. 20.

of referred to the plaintiff, even if the defendant did not know of the plaintiff's existence. It is difficult to argue that an intentional or negligent publication ought to be excused. But a rule of law which treats as such a publication one made with no intention of defaming the plaintiff is difficult to justify where the plaintiff's name has been used in the belief that it was that of an imaginary person, or without knowledge of his existence.

As the law stands to-day a person with no reputation is able to obtain damages upon the same footing as if he had a good reputation. The plaintiff is under no obligation to prove that he has suffered actual financial loss or damage. This is in contrast with liability for slander, where special loss or damage must be proved, except in cases which involve imputations of certain kinds of criminal conduct, of insolvency, of corruption, of unchastity (in the case of women) or where the words complained of have a natural tendency to injure the plaintiff in his trade or profession or to suggest that he is suffering from an obnoxious contagious disease. The extension to all actions for defamation of the requirement of proving special damage to the plaintiff would usually exclude the recovery of damages by plaintiffs of no reputation. At the same time the present law leaves without redress by an action for damages a person who suffers from the publicity given to offensive (but non-defamatory) statements about his private life which are of no public interest and may well be untrue.

The tendency of juries to regard the proprietors of newspapers as possessed of unfathomable pockets from which huge damages may be drained has been responsible for much speculative litigation on the part of plaintiffs whose reputations hardly seem to bear the monetary value at which juries are apt to assess them. But in a trial of an action for a libel contained in a newspaper evidence may be given in mitigation of damages that the plaintiff has recovered, or has brought actions for, damages or has received compensation in respect of a similar libel as that for which the present action has been brought: Law of Libel (Amendment) Act, 1881, s. 6.

In so far as the publication of defamatory matter consists of repetition there is discernible a tendency to treat those who are concerned with mere mechanical distribution, such as newsagents, circulating libraries and booksellers, in a more favourable manner with regard to liability than those who are primarily concerned with production of the printed word, such as newspaper proprietors, publishers, printers, authors and editors.<sup>1</sup> If this is so, the common law has reached a stage when it discriminates between the Press and those who distribute its products.

The title, *Press and Printing*,<sup>2</sup> in Halsbury, deals with several headings of statutory regulation, but excludes the important topic of newspaper libels. There are in the first place a number of formal statutory requirements relating to registration of the title of the paper and of particulars of the proprietor,<sup>3</sup> requiring the imprint of the printer, the preservation of copies, and the delivery of copies to the copyright libraries. These requirements, while admittedly peculiar to printers and newspaper publishers, are far less onerous than those from which they trace their origin. The earlier legislation of the Napoleonic era had for its object the restriction of political attacks upon the Government. The present law is contained in the Newspapers, Printers and Reading Rooms Repeal Act, 1869, and Newspaper Libel and Registration Act, 1881. There are also a number of restrictions on publication which may be classed under the head of advertisement regulation. These are largely the result of attempts by paternal Governments to check the spread of social evils, such as betting in certain forms, money-lending, cruelty to animals, and to a very limited extent quack cures for physical and mental ailments. Some are relics of the past, such as the prohibition on advertising public entertainments held on a Sunday,<sup>4</sup> and as such may constitute a trap for the editor and proprietor of an offending journal. One is of importance to the principle of free elections. It is illegal to incur expendi-

<sup>1</sup> See Winfield, *Text-Book of the Law of Tort* (1937), pp. 284 *et seq.*

<sup>2</sup> Halsbury, *Laws of England* (2nd ed.), vol. xxvi (1937), pp. 131-153.

<sup>3</sup> The requirement of registration does not apply to a newspaper which is the property of a joint-stock company.

<sup>4</sup> Sunday Observance Act, 1780, s. 3.



ture on the issue of advertisements to promote or to procure the election of a candidate at a parliamentary election without the authority of an election agent.<sup>1</sup> This provision enables the conviction of a "Press lord" who intervenes uninvited in an election campaign and incurs unauthorised expenditure on advertisements, but it does not prevent him seeking to attain his ends in the news columns of his paper.<sup>2</sup>

A recent enactment has prohibited the reporting by the Press of indecent details in relation to judicial proceedings; and in matrimonial causes the newspaper report must be confined to a summary giving the names of the parties, their legal advisers, the witnesses, a statement of the matter in issue, submissions and rulings on points of law and the judgment; the evidence given may not be published: Judicial Proceedings (Regulation of Reports) Act, 1926. The restrictions on the reports of matrimonial causes in the High Court were extended to all summary domestic proceedings by the Summary Procedure (Domestic Proceedings) Act, 1937, s. 3. The identity of any child or young person who is accused or who appears as a witness may not be disclosed in a Press report of the proceedings of a juvenile court of summary jurisdiction: Children and Young Persons Act, 1933, s. 49; but the representatives of the Press or news agencies are entitled to be present at the sittings of such a court: *ibid.*, s. 47. Photographing or sketching is prohibited in courts of justice: Criminal Justice Act, 1925, s. 41 (1) a.

The advantages which the Press enjoy consist mainly of the following special provisions in the law of libel; most of these are statutory.

The Libel Act, 1843, commonly known as Lord Campbell's Libel Act, provided by s. 2 that in an action arising out of a defamatory statement contained in a public newspaper or other periodical publication the defence of apology may be pleaded. The defendant may plead that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action or at the earliest opportunity afterwards he inserted a full apology.

<sup>1</sup> Representation of the People Act, 1918, s. 34.

<sup>2</sup> *The King v. Daily Mirror Newspapers* [1922] 2 K.B. 530.



Such a defence must be accompanied by a payment of money into court by way of amends. But if any part of the defence fails, the plaintiff must succeed in the action and damages are assessed without regard to the payment into court, the defendant being also liable for the whole costs of the action. Moreover by a recent amendment of the Rules of the Supreme Court (O. xxii. r. 6) neither the judge nor the jury may be informed of the fact of a payment into court having been made until the question of liability has been determined. This amendment does not apply to a defence under this section. The defence is not, therefore, commonly used. There is much to be said for a change in the general law which would prevent an action for libel lying against a defendant who can prove that he has been neither malicious nor negligent and is prepared to tender an apology and make the necessary correction.

In a criminal prosecution for libel (other than a blasphemous, seditious or obscene libel) truth is a defence if publication is shown to be for the public benefit: Libel Act, 1843, s. 6. Though not confined to the Press, this defence is obviously of considerable advantage to the Press, which is further favoured by a special provision which enables evidence of truth and publication for the public benefit to be heard by magistrates who may deal summarily with the case only in a prosecution against a newspaper: Newspaper Libel and Registration Act, 1881, ss. 4 and 5. Normally this defence is only available upon trial on indictment.

Section 7 of the same Act may enable a proprietor or even an editor of a newspaper to escape criminal liability if he can prove that publication was made without his authority, consent or knowledge and that the publication did not arise from want of due care or caution on his part. This again is not a defence peculiar to the Press, but it is more likely to benefit the proprietor of a newspaper than other members of the public.

Nor can a criminal prosecution be instituted at all against a proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel contained therein without the order of a judge in chambers. Upon the applica-

tion for this order the person accused must be given an opportunity of being heard : Law of Libel Amendment Act, 1881, s. 8. This restriction does not apply to a criminal information laid by the Attorney-General in respect of attacks upon the Government. In practice the law of criminal libel is seldom invoked against the Press.

The civil law of defamation contains some important statutory provisions of value to the Press. Fair and accurate reports in newspapers of judicial proceedings which contain matter alleged to be defamatory are privileged, if publication is contemporaneous : Law of Libel Amendment Act, 1888, s. 3. Blasphemous or indecent matter is not hereby sanctioned for publication, and, as has already been noted, reports of certain indecent details are prohibited and only limited particulars may be given of matrimonial proceedings in the High Court and of summary domestic proceedings. Fair and accurate contemporaneous reports in newspapers of proceedings of public meetings and of meetings of local authorities (except where neither the public nor the Press are admitted) enjoy similar privilege (*ibid.*, s. 4). This defence is not available in the case of the reports of meetings if it can be proved that the defendant has been requested to insert in the newspaper in which the report complained of appeared a reasonable letter or statement by way of contradiction or explanation and has refused or neglected to make the insertion. Press reports of parliamentary proceedings are, if fair and accurate, privileged at common law.<sup>1</sup> In general the privilege attaching to contemporaneous reports of all these proceedings is only rebuttable on proof of express malice on the part of the defendant newspaper. A fair report can hardly be malicious and is therefore within the special protection. The protection afforded by these provisions might well be extended to reports of the proceedings of any meetings to which members of the public are admitted, or of any documents to which the public have access, in the absence of proof of malice in the publication of the report. With a view to assisting publicity and arousing interest in the proceedings the Press enjoys the right of admission for their accredited representatives to the

<sup>1</sup> *Hason v. Walter* (1868) L.R. 4 Q.B. 73 ; K. & L. 105.

meetings of local authorities, but not to those of the various committees and sub-committees of such bodies, except the meetings in full committee of a local education or public assistance authority: Local Authorities (Admission of the Press to Meetings) Act, 1908. Press representatives may be temporarily excluded by resolution of a majority of the members present. Admission of the Press to the Houses of Parliament rests upon the same basis as admission of the general public. Each House only admits the public on sufferance and publication of its proceedings can be restricted as a matter of privilege. In practice the Press is afforded special facilities for obtaining parliamentary news and the last occasions (seven in all) of secret sessions were in 1916-18 in time of war.<sup>1</sup> On occasions when the general public have been excluded by reason of persistent misbehaviour on the part of a section of the public, the Press gallery has remained open.

Though not of direct protection to the Press there are a number of cases where defamatory statements are absolutely privileged, namely, those made in the course of judicial proceedings or parliamentary debates, in communications by Government Departments, in pursuance of military and naval duty, including statements made at courts-martial or courts of inquiry, and in documents published by authority of Parliament. Moreover the Press and public alike enjoy protection in the form of qualified privilege, which may only be displaced by proof of malice, attaching to communications made in the course of legal, social or moral duties. Fair comment on matters of public interest is also a defence to an

<sup>1</sup> On the days when a secret session was desired strangers were first excluded by agreement of the House. A resolution followed such exclusion to the effect that the remainder of the day's sitting should be a secret session. By Regulation 27A, dated 22nd April, 1916, made by Order in Council under the Defence of the Realm Act, 1914, it was provided that, if either House of Parliament, in pursuance of a resolution passed by that House, held a secret session, it should not be lawful for any person in any newspaper, periodical, circular or other printed publication or in any public speech to publish any report of or to purport to describe or to refer to the proceedings at such session, except such report thereof as might be officially communicated through the Official Press Bureau. *London Gazette*, 1916, p. 4189. May, *Parliamentary Practice* (13th ed., 1924), pp. 204, 205.

action for defamation and the Press is peculiarly the guardian of the public interest.

The following is the text of a Bill for amending the law of libel which was sponsored in 1938 by the Empire Press Union :

1. Except in cases in which the plaintiff proves actual financial damage, no action for libel published after the passing of this Act shall lie unless the words complained of :—

- (a) Impute sexual immorality, drunkenness or cruelty ; or
- (b) charge the plaintiff with having committed an offence punishable by imprisonment or impute that the plaintiff has an obnoxious contagious disease ; or
- (c) are published of the plaintiff in relation to his or her office, profession or trade or in relation to his or her conduct in performance of a public duty.

Provided always that unless the Judge certifies to the contrary a plaintiff shall not in respect of any action which lies by reason of paragraphs (a) and (c) hereof recover more costs than damages.

2. In any action for libel, where the libel complained of has been published after the passing of this Act, it shall be a defence for the defendant to prove that at the date of publication he had no reasonable ground for supposing that the words complained of referred to the plaintiff.

3. A fair and accurate report published in any newspaper of any proceedings to which members of the public are admitted or of any document to which members of the public have access shall, provided the subject matter of such proceedings or document be of public interest, be privileged unless it be proved that such report was published maliciously ; provided that the protection intended to be afforded by this section shall not be available in any proceedings if it shall be proved that the defendant has been requested to insert in the newspapers in which the report complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report and had refused or neglected to insert the same.

4. A meeting of shareholders of a public company shall be deemed to be a public meeting within the meaning of section 4 of the Law of Libel Amendment Act, 1888.

### (C) *Contempt of Court*

Freedom of discussion of necessity must extend, if it is to be effective, over the whole range of governmental activity. It is not, therefore, sufficient to limit this account of the

restrictions which are placed by law upon this freedom to those which relate to political criticism directed chiefly against the Administration. Both the courts and Parliament are provided with the means of defence against criticism which they may regard as unwarranted in the form of the powers which each possesses to punish for contempt. It is necessary to examine these powers and to consider whether they may be used to stifle legitimate criticism as well as defamatory attack.

*Commitment for contempt by a Court.*—In the case of the judicial organs criminal contempt of court takes two forms : <sup>1</sup>

- (1) Contempt consisting of conduct (a) by strangers, (b) by parties which scandalises the court itself.
- (2) Conduct which is calculated to prejudice a pending proceeding.

Under the first head, apart from the commission of actual violence to the court and those taking part in its proceedings, the use of threatening words or scurrilous abuse concerning any judge of a superior court of record constitutes a criminal offence which the court has power to punish by fine and imprisonment at its pleasure. No trial of the offence by a jury is permitted. Nor is this arbitrary power to punish limited to the trial judge. The contempt is contempt of the court and, if it constitutes an impediment to the administration of justice by the court, may be punished by any member of the court. It is, of course, permissible to discuss the merits of any judgment or sentence, but the court has power to punish criticism which it regards as mere invective or as tending to bring into ridicule and contempt the administration of justice. It is not therefore permissible to publish an article attributing a particular decision to the personal idiosyncrasies of the judge, for that is to suggest that he is incapable of administering impartial justice in a particular case or class of case. It is dangerous to do this even by innuendo. Adverse comment in a well-known periodical upon a judgment concluding with regrets of the likelihood of

<sup>1</sup> Discussion is confined to the powers of the higher courts to punish for contempt; civil contempt, i.e. refusal to obey a judgment or other process of law, is not included.

similar decisions on the ground that "an individual owning such views as the defendant could not apparently hope for a fair hearing in a court presided over by Mr. Justice Blank - and there are so many Mr. Justice Blanks" (naming the trial judge)—thereby imputing partiality, has been held to constitute contempt in proceedings tried by three colleagues of the judge in question.<sup>1</sup> Indeed it would be difficult to advise what measure of criticism of a judgment is permissible if it be directed beyond the merits of the decision in law. In *The Queen v. Gray*<sup>2</sup> it was said by Lord Russell of Killowen that any act done or writing published which was calculated to bring a court or a judge of the court into contempt or to lower his authority is a contempt of court. The contempt in question was a matter of scurrilous abuse. Contempt of this form scandalising a court is, however, subject to an important qualification stated by the same authority. Reasonable argument or expostulation may be offered against any judicial act as contrary to law or the public good.<sup>3</sup> The "humble submissions" of sarcastic contributors to periodicals like the *Law Quarterly Review* probably protect them, but excursions into criticism in the Press upon the social implications of (say) a judgment which condemns an exponent of birth control at the suit of a Roman or Anglo-Catholic opponent is dangerous, if the judge has himself expressed his disapproval of the defendant's beliefs in the course of the proceedings. For it may amount to an imputation of partiality on the part of the judge, or even reflect upon the Bench as a whole.

The limits of permissible criticism of judicial acts were reviewed by Lord Atkin in delivering a recent opinion of the Judicial Committee of the Privy Council: *Ambard v. Attorney-General for Trinidad and Tobago*:<sup>4</sup>—

Whether the authority and position of an individual judge,

<sup>1</sup> *The King v. New Statesman* (Editor) *ex parte* Director of Public Prosecutions (1928) 44 T.L.R. 301.

<sup>2</sup> [1900] 2 Q.B. 36.

<sup>3</sup> See *McLeod v. St. Aubyn* [1899] A.C. 549, at p. 551, for the authorities which established this common law jurisdiction, rarely used in England, to punish as contempt scandalous matter concerning the court itself as a court.

<sup>4</sup> [1936] A.C. 323, at p. 335.



or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

The cause of this important utterance was a case involving the liberty of the Press. A journalist had been fined for contempt by a colonial court of three judges. The sentences imposed by two of these judges in criminal cases had been criticised by him in an article dealing with the perennial topic of inequality of sentences. The Board advised that the conviction should be quashed.

The surest defence against any oppressive conduct by a court in the exercise of its powers to attach for contempt lies in securing a high standard of ability and character in the personnel of the court. For this reduces the occasions for allegations of partiality and violent criticism of its conduct and should ensure that only in serious cases of genuine contempt will the court be moved to resort to process for committal. There is, however, a latent danger lest the social prejudices, from which not even the holders of high judicial office are always exempt, may lead to the stifling of criticism to which public opinion as a whole takes no exception. It would furnish an interesting sociological study to collect from the pages of the law reports evidence of the social background of members of the Bench, but the author and publisher of such research would have to walk warily lest the conclusions of the former should be deemed to constitute contempt in the sense discussed here.

Nor is the matter one of merely academic interest in a society which is divided by extremes of political, social and economic outlook, such as only a democracy can freely exhibit. A bench of fascist judges, if ever such should exist,

is well equipped under the existing state of the law with the means of stifling its more voluble opponents. Happily, as yet, tradition and training of Bench and Bar have prevented any such occasion from arising.

The second form of criminal contempt of court which is also punishable by fine or attachment, is conduct whether by the parties or by strangers which is calculated to prejudice the impartial hearing of a pending proceeding. The offence is based upon the idea of not allowing the jury to hear before the trial of the past bad character of the accused in a criminal case. But the offence is not limited to criminal proceedings. The exercise of this jurisdiction is, on the whole, beneficial and constitutes a severe restriction upon the investigations into crime in which the gutter Press is wont to indulge. Newspaper criticism is, in fact, the commonest form of contempt of court.

"Every libel upon a person about to be tried is not necessarily a contempt of court, but the applicant must show that something has been published which either is clearly intended, or at least is calculated to prejudice the trial which is pending."<sup>1</sup> The case from which this extract is taken shows that the court will only exercise this salutary power where there is a real danger of prejudicing a trial, as there is in a case where a newspaper comments upon the probable result or the previous characters of the parties or even publishes a photograph of an accused person.

It is interesting to record that in 1906 and again in 1908 the House of Commons passed resolutions drawing attention to the fact that the jurisdiction of judges in dealing with contempt of court was practically arbitrary and unlimited and expressing the opinion that action by Parliament was called for with a view to the definition and limitation of this jurisdiction.<sup>2</sup> Between 1883 and 1908 no less than five unsuccessful attempts were made to deal with the subject by legislation.<sup>3</sup> There is historical evidence that criminal con-

<sup>1</sup> *The Queen v. Payne and Cooper* [1896] 1 Q.B., 577, at p. 580.

<sup>2</sup> House of Commons Debates, 4th Series, vol. 155, col. 614; vol. 185, col. 1432.

<sup>3</sup> See Fox, *History of Contempt of Court*, p. 3.

tempts committed by a stranger out of court by libelling the judge were at one time treated like any other trespass and tried with a jury.<sup>1</sup>

In practice there is as great danger of prejudicing a fair trial in the perfectly lawful publication of the proceedings before magistrates prior to committal of the accused for trial, especially since the accused usually reserves his defence and therefore only the case for the prosecution can be reported. In cases of murder or manslaughter the reports of coroners' inquests, where the proceedings are not restricted by the rules of evidence in force in a criminal court, may constitute a real danger lest the trial jury should form a preconceived opinion adverse to the accused before hearing his case.

*Commitment for contempt by Parliament.*—Each House of Parliament enjoys the power, based upon immemorial usage, to punish for breach of its peculiar privileges. Commitment for contempt is the most severe of the available punishments. In so far as the House of Commons, which has furnished in the course of its history most of the controversies raging round parliamentary privileges, does not exceed its powers to control its own unruly members, the subject is one of domestic discipline. Occasionally, however, the House has punished other persons than its members and officers by commitment or other less drastic penalty. The classical illustration is afforded by the *Case of the Sheriff of Middlesex*<sup>2</sup> where the opinion of Lord Ellenborough expressed in *Burdett v. Abbot*<sup>3</sup> prevailed: "If a commitment appeared to be for contempt of the House of Commons generally [*i.e.* without specifying the cause upon which the contempt was grounded] I would neither in the case of that court nor of any other of the superior courts inquire further." It thus lies within the power of the House of Commons arbitrarily to commit for contempt without stating the reason, for such might disclose a ground of action of which the courts could take cognisance. No writ of habeas corpus will lie to secure release of the person committed. Unlike commitment by the House of Lords or the other superior courts of record, which may be for an indefinite

<sup>1</sup> *Op. cit.*, pp. 4, 34 *et seq.*

<sup>2</sup> (1840) 11 A. & E. 809; K. & L. 92.

<sup>3</sup> (1811) 14 East 1.

period, the period of committal by the House of Commons is terminated by prorogation at the end of the session, but not by an adjournment of the House, however lengthy. Imprisonment for contempt of the High Court is, however, purely at the will and pleasure of the court itself. It is thus to be remarked that both Parliament and the higher courts of the land possess that very power of arbitrary imprisonment which is denied to the Administration by the combined effect of a statute of the Long Parliament,<sup>1</sup> so far as the King and the Privy Council are concerned, and the procedure by writ of habeas corpus.

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### SECTION III

#### DISSOLUTION OF PARLIAMENT

THE following letter written by Professor Dicey at the time of the controversy over the Home Rule Bill in 1913 should be regarded as supplementary to Chapter XIV (*ante*). For the full context of the letter reference should be made to the correspondence quoted in Jennings' *Cabinet Government*, Appendix iv.

#### PROFESSOR A. V. DICEY TO "THE TIMES"<sup>2</sup>

Allow me to express my complete agreement with Sir William Anson's masterly exposition of the principles regulating the exercise of the prerogative of dissolution. On this matter I write with some little confidence. My *Law of the Constitution* (7th edition), pp. 428-434, contains an examination of the constitutional doctrine as to the dissolution of Parliament. This doctrine has been repeated and defended during the last 28 years in every edition of my book. My opinion as to the occasions on which a dissolution may rightly take place has, as far as I know, never been assailed and assuredly has never been controverted by any writer of authority. Let me add to the lucid statement

<sup>1</sup> Star Chamber Abolition Act, 1641.

<sup>2</sup> Reproduced by kind permission of the Proprietors of *The Times*. •

of constitutional law by my friend Sir William Anson the following observations which at the present moment (*i.e.* after the Home Rule Bill, 1912, had twice been passed by the Commons) deserve attention :

1. A dissolution of Parliament before the beginning of the next Session by the King in conformity with the advice of a Minister ready to assume the responsibility for this course of action, would be amply justified by the precedents of 1784 and 1834. No statesman need be ashamed to follow the example of Pitt or of Peel. One may add that the whole current of modern constitutional custom involves the admission that the final decision of every grave political question now belongs, not to the House of Commons, but to the electors as the representatives of the nation.

2. A dissolution before the commencement of the next Session, which will be the third Session of the Home Rule Bill, may take place, and ought to take place, with the assent of Mr. Asquith and his colleagues. Such a dissolution will not be the sacrifice of the policy of Home Rule, it will not even be the sacrifice of the present Home Rule Bill. If the Government obtain after the dissolution a substantial majority in the House of Commons they will still, under the Parliament Act, be able to present the Bill to the King for his acceptance without obtaining the consent of the House of Lords (see Parliament Act, section 2).

3. A dissolution after the beginning of the next Session, but before the Home Rule Bill has become the Home Rule Act, will be fatal to the existing Home Rule Bill, and this for a perfectly plain reason. In order that the Parliament Act may apply to the Bill, the Bill must be passed by the House of Commons and rejected by the House of Lords in each of three "successive" Sessions. But if a dissolution takes place during the third Session, but before the Bill has become an Act, it can never be passed and rejected in three such successive Sessions. If a dissolution does not take place before the beginning of the next Session, the destruction of the Home Rule Bill by a dissolution which may take place during the next Session will be due to the obstinacy of Ministers who will have refused to give ear in due time to the demand of the nation that the union between England and Ireland shall not be in effect repealed until the policy of Home Rule shall have obtained the direct and indubitable sanction of the electorate.

4. Rumour imputes to the Premier the intention of passing the Home Rule Act, 1914, say in June next, and advising a dissolution during the months which must elapse before the Act will have come into full operation. The recklessness and fatuity



of such a policy render its adoption all but incredible. This sham appeal to the people will, in the eyes of Unionists, whether in England or in Ireland, involve the addition of insult to injustice. A man of Mr. Asquith's calmness and sense cannot wish to redouble the chance of civil war; he has apparently rejected the idea of submitting the Home Rule Bill to a Referendum; he surely cannot think that Englishmen or Irishmen will tolerate that parody of a Referendum which, under the name of a plebiscite, has been invented by French Jacobinism and has been performed again and again by French Imperialism.

5. The question is sometimes now raised whether during the present political crisis the King could rightly or wisely refuse assent to the Home Rule Bill after it should for a third time have been passed by the House of Commons and rejected by the House of Lords. This is happily a purely academic inquiry on which I decline now to enter. Every advantage by way of appeal to the electors, in consequence of the exercise of the so-called Royal veto, can be far better and more regularly obtained by a dissolution of Parliament. Mr. Balfour has struck the right note. The safety and the prosperity of the United Kingdom absolutely demand a speedy dissolution. As regards the Veto itself, I am well content to adopt the language of Burke:

"The King's negative to Bills is one of the most undisputed Royal prerogatives, and it extends to all cases whatsoever. I am far from certain that if several laws which I know had fallen under the stroke of that sceptre the public would have had a very heavy loss. But it is not the propriety of the exercise which is in question. Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth."

(*The Times*, September 15th, 1913.)

It may be admitted that prior to 1832 the Crown retained the power of nominating the Prime Minister. The ability of the King to obtain a majority in the Commons in favour of the Ministry so appointed facilitated the free exercise of his choice. Melbourne's resignation in 1834 (it is not now regarded as a true precedent of dismissal)<sup>1</sup> was due to the non-recognition by William IV of the implications of the Reform Act. The King might have suffered greater embarrassment than he did after Peel's failure to secure a majority, had

<sup>1</sup> See Jennings, *Cabinet Government* (1936), pp. 299-307; *Life of Lord Oxford and Asquith* (1932), vol. ii, pp. 30, 31.



not the discussion of the constitutional question in the House of Commons led to a reaffirmation of the principle of the impersonal aspect of the King's political actions.<sup>1</sup> George III, it is true, had to some extent maintained that the acceptance of Ministries not of his own choice involved inroads upon his prerogative; he certainly devised means for ejecting them. If Queen Victoria was the last Monarch to prevent a change of Ministers to suit her own convenience, her predecessor was the last to force a change of Ministers in compelling Melbourne's resignation in 1834.

If there can be any justification to-day for the dismissal of a Ministry which commands a majority in the House of Commons, it must be based upon the plea that the majority no longer reflects the wishes of the electorate. The first step to test the validity of such a plea must be a dissolution. The ensuing general election will then answer the question within the limits of the representative system working on a three-party basis. But, if the King is to avoid personal implication in party controversies, he must obtain the advice of his Ministers to dissolve. As to this, constitutionally he may cajole, he may remonstrate, but he cannot refuse the final advice of a Prime Minister who commands a majority in the House of Commons.<sup>2</sup> If that advice is against a dissolution, the King cannot without forcing the resignation of his existing Ministers find another Prime Minister who would be ready to assume responsibility for advising a dissolution. Such a course would lay the Crown open to a charge of favouring the new Ministry. No appeal to the precedents of 1784 and 1834 could preserve the reputation for impartiality upon which the Monarchy depends. Dissolution must rest upon the advice of Ministers alone. Otherwise "no dissolution would be free from ambiguity, and speculation as to the degree of responsibility of the Sovereign would be a feature of every election."<sup>3</sup>

But ought the King ever to assume to the point of forcing

<sup>1</sup> Emden, *The People and the Constitution* (1933), pp. 143, 147.

<sup>2</sup> Esher, *Journals and Letters*, vol. iii (1938), pp. 126-131, for Memorandum on Prerogative.

<sup>3</sup> *The Times*, 10th Sept., 1913: Letter from Prof. J. H. Morgan, reproduced, Jennings, *op. cit.*, App. iv.

the resignation of the Ministry that his Ministers have lost the confidence of the electorate so long as they command a majority in Parliament? The answer, it is suggested, is No.<sup>1</sup> The constitution provides for testing this confidence every four or five years by a general election. The one possible justification would be if the Lords and Commons combined to prolong indefinitely the life of a sitting Parliament.<sup>2</sup> For it would destroy the democratic basis of the constitution, if expression of popular opinion by the ballot box were suppressed as the result of this unlikely conspiracy between an hereditary chamber and one elected by universal suffrage. Dr. Jennings suggests that the King's function is to see that the constitution functions in the normal manner. This is equally the function of his Ministers. The normal manner assumes the approval of the electorate in the long run. Only if the existing Ministry prevents the electorate speaking in its due time can the King dissolve against their advice. The decision to dissolve would be equivalent to dismissal of the Ministry.

## SECTION IV

### SWISS FEDERALISM<sup>3</sup>

#### *Leading Characteristics of Federal Government*<sup>4</sup>

Federalism is a natural constitution for a body of States which desire union and do not desire unity. Take as countries which exhibit this state of feeling the United States, the Federal Dominions of Canada and Australia, the Swiss Con-

<sup>1</sup> Jennings, *op. cit.*, pp. 306, 307.

<sup>2</sup> The Bill would require the assent of Lords and Commons: Parliament Act, 1911, s. 2 (1).

<sup>3</sup> This note is reproduced from the eighth edition (1915). The first part, in the text of which no changes have been made, formed a portion of the Introduction (pp. lxxx-lxxx). Considerable alteration has been made in the latter part, which is taken from Dicey's Appendix, note viii, in order to give the student an account of the Swiss Constitution as it functions at the present time.

<sup>4</sup> See especially ch. iii, p. 138, *ante*. It is worth observing that the substance of this chapter was published before the production by Gladstone of his first Home Rule Bill for Ireland.

federation, and the (former) German Empire and contrast with this special condition of opinion the deliberate rejection by all Italian patriots of federalism, which in the case of Italy presented many apparent advantages, and the failure of union between Sweden and Norway to produce any desire for unity or even for a continued political connection, though these Scandinavian lands differ little from each other in race, in religion, in language, or in their common interest to maintain their independence against neighbouring and powerful countries.

The physical contiguity, further, of countries which are to form a confederated State is certainly a favourable, and possibly a necessary, condition for the success of federal government.

The success of federal government is greatly favoured by, if it does not absolutely require, approximate equality in the wealth, in the population and in the historical position of the different countries which make up a confederation. The reason for this is pretty obvious. The idea which lies at the bottom of federalism is that each of the separate States should have approximately equal political rights and should thereby be able to maintain the "limited independence" (if the term may be used) meant to be secured by the terms of federal union. Hence the provision contained in the constitution of the United States under which two Senators, and no more, are given to each State, though one be as populous, as large and as wealthy as is New York, and another be as small in area and contain as few citizens as Rhode Island. Bagehot, indeed, points out that the equal power in the Senate of a small State and of a large State is from some points of view an evil. It is, however, an arrangement obviously congenial to federal sentiment. If one State of a federation greatly exceed in its numbers and in its resources the power of each of the other States, and still more if such "dominant partner," to use a current expression, greatly exceed the whole of the other Confederate States in population and in wealth the confederacy will be threatened with two dangers. The dominant partner may exercise an authority almost inconsistent with federal equality. But, on the other hand, the other States, if

they should possess under the constitution rights equal to the rights or the political power left to the dominant partner, may easily combine to increase unduly the burdens, in the way of taxation or otherwise, imposed upon the one most powerful State.

Federalism, when successful, has generally been a stage towards unitary government. In other words, federalism tends to pass into nationalism. This has certainly been the result of the two most successful of federal experiments. The United States, at any rate as they now exist, have been well described as a nation concealed under the form of a federation. The same expression might with considerable truth be applied to Switzerland. Never was there a country in which it seemed more difficult to produce national unity. The Swiss Cantons are divided by difference of race, by difference of language, by difference of religion. These distinctions till nearly the middle of the nineteenth century produced a kind of disunion among the Swiss people which in 1914 seems almost incredible. They forbade the existence of a common coinage; they allowed any one Canton to protect the financial interest of its citizens against competition by the inhabitants of every other Canton. In 1847 the Sonderbund threatened to destroy the very idea of Swiss unity, Swiss nationality, and Swiss independence. Patriots had indeed for generations perceived that the federal union of Switzerland afforded the one possible guarantee for the continued existence of their country. But attempt after attempt to secure the unity of Switzerland had ended in failure. The victory of the Swiss federalists in the Sonderbund war gave new life to Switzerland: this was the one indubitable success directly due to the movements of 1847-48. It is indeed happy that the victory of the federal armies took place before the fall of the French Monarchy, and that the Revolution of February, combined with other movements which distracted Europe, left the Swiss free to manage their own affairs in their own way. Swiss patriotism and moderation met with their reward. Switzerland became master of her own fate. Each step in the subsequent progress of the new federal State has been a step along the path leading from confederate union to national unity.

A federal constitution is, as compared with a unitary constitution, a weak form of government. Few were the thinkers who in 1884 would have denied the truth of this proposition. In 1914 language is constantly used which implies that a federal government is in itself superior to a unitary constitution such as that of France or of England. Yet the comparative weakness of federalism is no accident. A true federal government is based on the division of powers. It means the constant effort of statesmanship to balance one State of the confederacy against another. One cannot rate too highly the success with which a complicated system is worked by the members of the Swiss Council or, to use expressions familiar to Englishmen, by the Swiss Cabinet. Yet everywhere throughout Swiss arrangements you may observe the desire to keep up a sort of balance of advantages between different States. The members of the Council are seven in number; each member must, of necessity, belong to a different Canton. The Federal Parliament meets at Bern; the Federal Tribunal sits at Lausanne in the Canton of Vaud; the Federal Polytechnic is allotted to a third Canton, namely, Zurich. Now rules or practices of this kind must inevitably restrict the power of bringing into a Swiss Cabinet all the best political talent to be found in Switzerland. Such a system applied to an English or to a French Cabinet would be found almost unworkable. Federalism again would mean, in any country where English ideas prevail, the predominance of legalism, or in other words, a general willingness to yield to the authority of the law courts. Nothing is more remarkable, and in the eyes of any impartial critic more praiseworthy, than the reverence paid on the whole by American opinion to the Supreme Court of the United States. Nor must one forget that the respect paid to the opinion of their own judges, even when deciding questions on which political feeling runs high, is, on the whole, characteristic of the citizens of each particular State. The Supreme Court, *e.g.*, of Massachusetts may be called upon to determine in effect whether a law passed by the legislature of Massachusetts is, or is not, constitutional; and the decision of the court will certainly meet with obedience. Now, what it is necessary to insist upon is that this legalism

which fosters and supports the rule of law is not equally displayed in every country. No French court has ever definitely pronounced a law passed by the French legislature invalid, nor, it is said, has any Belgian court ever pronounced invalid a law passed by the Belgian Parliament. Whether English electors are now strongly disposed to confide to the decision of judges questions which excite strong political feeling is doubtful. Yet—and this is no insignificant matter—under every federal system there must almost of necessity exist some body of persons who can decide whether the terms of the federal compact have been observed. But if this power be placed in the hands of the Executive, the law will, it may be feared, be made subservient to the will of any political party which is for the moment supreme. If it be placed in the hands of judges, who profess and probably desire to practise judicial impartiality, it may be very difficult to ensure general respect for any decision which contradicts the interests and the principles of a dominant party.<sup>1</sup> Federalism, lastly, creates divided allegiance. This is the most serious and the most inevitable of the weaknesses attaching to a form of government under which loyalty to a citizen's native State may conflict with his loyalty to the whole federated nation. Englishmen, Scotsmen and Irishmen have always, as soldiers, been true to the common flag. The whole history of the Sonderbund in Switzerland and of secession in the United States bears witness to the agonised perplexity of the noblest among soldiers when called upon to choose between loyalty to their country and loyalty to their Canton or State. One example of this difficulty is amply sufficient for my purpose. General Scott and General Lee alike had been trained as officers of the American Army; each was a Virginian; each of them was determined from the outbreak of the Civil War to follow the dictates of his own conscience; each was placed in a position as painful as could be occupied by a soldier of bravery and honour; each was a victim of that double allegiance which is all but inherent

<sup>1</sup> In Switzerland the safeguard of the constitution against revolutionary changes by the party in power is to be found in the devices of the referendum and the initiative, devices which ensure the direct vote of the people and the Cantons upon proposals for constitutional amendment.  
— Ed.



in federalism. General Scott followed the impulse of loyalty to the Union. General Lee felt that as a matter of duty he must obey the sentiment of loyalty to Virginia.

In any estimate of the strength or the weakness of federal government it is absolutely necessary not to confound, though the confusion is a very common one, federalism with nationalism. A truly federal government is the denial of national independence to every State of the federation. No single State of the American Commonwealth is a separate nation; no State, it may be added, *e.g.* the State of New York, has anything like as much of local independence as is possessed by New Zealand or by any other of the five Dominions. There is of course a sense, and a very real sense, in which national tradition and national feeling may be cultivated in a State which forms part of a confederacy. The French inhabitants of Quebec are Frenchmen to the core. But their loyalty to the British Empire is certain. One indisputable source of their imperial loyalty is that the break-up of the Empire might, as things now stand, result to Canada in union with the United States. But Frenchmen would with more difficulty maintain their French character if Quebec became a State of the Union and ceased to be a Province of the Dominion. In truth national character in one sense of that term has less necessary connection than Englishmen generally suppose with political arrangements. It would be simple folly to assert that Sir Walter Scott did not share the sentiment of Scottish nationalism; yet the influence of Scott's genius throughout Europe was favoured by, and in a sense was the fruit of, the union with England. But the aspiration and the effort towards actual national independence is at least as inconsistent with the conditions of a federal as with the conditions of a unitary government. Any one will see that this is so who considers how patent would have been the folly of the attempt to establish a confederacy which should have left Italy a State of the Austrian Empire. Nor does historical experience countenance the idea that federalism, which may certainly be a step towards closer national unity, can be used as a method for gradually bringing political unity to an end.

*Swiss Federalism*<sup>1</sup>

The Swiss Federal constitution may appear to a superficial observer to be a copy in miniature of the constitution of the United States; and there is no doubt that the Swiss statesmen of 1848 did in one or two points, for example in the balance between the two councils of the Federal Assembly, intentionally follow American precedents. But for all this, Swiss Federalism is the natural outgrowth of Swiss history, and bears a peculiar character of its own that well repays careful study. Two ideas underlie the institutions of modern Switzerland. The first is the uncontested and direct sovereignty of the nation. In Switzerland the will of the people, when expressed in the mode provided by the constitution, is admittedly supreme. This supremacy is not disputed by any political party or by any section of the community. No one dreams of changing the democratic basis of the national institutions. There does not exist in Switzerland any faction which, like the reactionists in France, meditates the overthrow of the Republic. There does not exist any section of the community which, like the Sudetens in the former Czecho-Slovakia, is disloyal to the Central Government. But in Switzerland not only the supremacy but the direct authority of the nation is, practically as well as theoretically, acknowledged. The old idea of the opposition between the Government and the people has vanished. All parts of the Government, including in that term not only the executive but also the legislative bodies, are the recognised agents of the nation, and the people intervene directly in all important acts of legislation. In Switzerland, in short, the nation is sovereign in the sense in which a powerful king or queen was sovereign in the time when monarchy was a predominant power in European countries, and we shall best understand the attitude of the

<sup>1</sup> See Lowell, *Governments and Parties in Continental Europe* (2nd ed., 1908), ii, *Switzerland*, pp. 180-336; Orelli, *Das Staatsrecht der Schweizerischen Eidgenossenschaft*; Marquardsen, *Handbuch des Öffentlichen Rechts*, iv. i. 2. And the more recent works; Fritz Fleiner, *Schweizerisches Bundesstaatsrecht* (1923); W. Burckhardt, *Kommentar der Schweizerischen Bundesverfassung vom 29 Mai, 1874* (3rd ed., 1931); *La Vie juridique des peuples*, vol. vi, *Suisse* (1935) (especially the three first chapters).

Swiss nation towards its representatives, whether in the Executive or in Parliament, by considering that the Swiss people occupies a position not unlike that held, for example, by Elizabeth of England. However great the Queen's authority, she was not a tyrant, but she really in the last resort governed the country, and her ministers were her servants and carried out her policy. The Queen did not directly legislate, but by her veto and by other means she controlled all important legislation. Such is, speaking roughly, the position of the Swiss people. The Federal Executive and the Federal Parliament pursue the lines of policy approved by the people. Under the name of the referendum there is exercised a popular veto on laws passed by the Legislature, and, under the name of the initiative, direct constitutional amendment by the people has been successfully introduced on several occasions. Whatever be the merits of Swiss institutions, the idea which governs them is obvious. The nation is monarch, the Executive and the members of the Legislature are the people's agents or ministers.

The second idea to which Swiss institutions give expression is that politics are a matter of business. The system of Swiss government is business-like. The affairs of the nation are transacted by men of capacity, who give effect to the will of the nation.

These are the principles or conceptions embodied in Swiss institutions; they are closely interconnected, they pervade and to a great extent explain the operation of the different parts of the Swiss constitution. Many of its features are of course common to all federal governments, but its special characteristics are due to the predominance of the two ideas to which the reader's attention has been directed. That this is so will be seen if we examine the different parts of the Swiss constitution.

*I. The Federal Council.*—This body, which we should in England call the Cabinet, consists of seven persons elected at their first meeting by the two Chambers which make up the Swiss Federal Assembly or Congress. The Councillors hold office for four years, and being elected after the first meeting of the Assembly, which itself is elected for four years, keep

their places till the next Federal Assembly meets, when a new election takes place. The Councillors need not be, but in fact are, elected from among the members of the Federal Assembly, and though they lose their seats on election, yet, as they are entitled in the capacity of councillors to take part in the debates of each House, they may for practical purposes be considered members of the Assembly or Parliament. The powers confided to the Council are wide. The Council is the Executive of the Confederacy and possesses the authority naturally belonging to the national Government. It discharges also, strange as this may appear to Englishmen or Americans, some<sup>1</sup> judicial functions. The Council is in fact the centre of the whole Swiss Federal system because of its influence upon the Assembly. The same is true of the British Cabinet. It is called upon to keep up good relations between the Cantons and the Federal or National Government, and generally to provide for the preservation of order, and ultimately for the maintenance of the law throughout the whole country. All foreign affairs fall under the Council's supervision, and the conduct of foreign relations must, under the circumstances of Switzerland, always form a most important and difficult part of the duties of the Government.

Though the Councillors are elected, they are not dismissible by the Assembly, and in so far the Council may be considered an independent body: but from another point of view the Council has no independence. It is expected to carry out, and does carry out, the policy of the Assembly, and ultimately the policy of the nation, just as a good man of business is expected to carry out the orders of his employer. Many matters which

<sup>1</sup> For example see the *loi Fédérale sur la juridiction administrative et disciplinaire* (1928), art. 22.

(i) In appeals by private individuals against decisions of the various Departments of the Federal Council.

(ii) In appeals against decisions of the Federal Railway Administration, e.g. where the purchase of a privately owned line is disputed by the owners. And under the *loi d'organisation judiciaire Fédérale* (1893), art. 189 (as amended), the Federal Council exercises an appellate jurisdiction from cantonal decisions, e.g. relating to non-discrimination on grounds of religion in elementary schools, soldiers' equipment gratuities, burial grounds and in general in the application of federal constitutional law, and upon differences arising from treaties relating to trade, customs, patents and military taxation.—ED.

are practically determined by the Council might constitutionally be decided by the Assembly itself, which, however, as a rule leaves the transaction of affairs in the hands of the Council. But the Council makes reports to the Assembly, and, were the Assembly to express a distinct resolution on any subject, effect would be given to it. Nor is it expected that either the Council or individual Councillors should go out of office because proposals or laws presented by them to the Assembly are rejected, or because a law passed, with the approval of the Council, by the Chambers, is vetoed on being referred to the people.

The statesmen who in 1848 built up the fabric of the Swiss Confederation have, it would seem, succeeded in an achievement which has twice at least baffled the ingenuity of French statesmanship. The working of this system is noteworthy. The Swiss government is elective, but as it is chosen by each Assembly Switzerland thus escapes the turmoil of a presidential election, and each new Assembly begins its existence in harmony with the Executive. The Council, it is true, cannot be dismissed by the Legislature, and the Legislature cannot be dissolved by the Council. But conflicts between the Government and the Assembly are unknown, because the Government considers itself the agent of the Assembly. Switzerland is the most democratic country in Europe, and democracies are supposed, not without reason, to be fickle; yet the Swiss executive power possesses a permanence and stability which does not characterise any parliamentary Cabinet. An English Ministry, to judge by modern experience, cannot often retain power for more than the duration of one Parliament; the Cabinets of Louis Philippe lasted on an average for about three years; under the Republic the lifetime of a French administration is measured by months. The members of the Swiss Ministry, if we may use the term, are elected only for four years; they are however re-eligible, and re-election is not the exception but the rule. The men who make up the administration are rarely changed. You may, it is said, find among them statesmen who have sat in the Council for over twenty-five years consecutively. This permanent tenure of office does not, it would seem, depend upon the possession by



particular leaders of extraordinary personal popularity, or of immense political influence ; it arises from the fact that under the Swiss system there is no more reason why the Assembly should not re-elect a trusted administrator, than why in England a joint-stock company should not from time to time reappoint a chairman in whom they have confidence. The Swiss Council, indeed, is—as far as a stranger dare form an opinion on a matter of which none but Swiss citizens are competent judges—not a Ministry or a Cabinet in the English sense of the term. It may be described as a Board of Directors appointed to manage the concerns of the Confederation in accordance with the articles of the constitution and in general deference to the wishes of the Federal Assembly. The business of politics is managed by men of business who transact national affairs, but are not statesmen who, like a Cabinet, are at once the servants and the leaders of a parliamentary majority.

II. *The Federal Assembly.*—This Parliament is modelled to a certain extent on the American Congress. For several purposes, however, the two chambers of which it consists sit together, namely, for the elections of the Federal Council, of the Federal Tribunal, of the Chancellor (the Secretary of the Council) and of the Commander-in-Chief of the Federal Army, who is elected only in times of national emergency. The Assembly, moreover, is, unlike any representative assembly to which the English people are accustomed, on certain administrative matters a final Court of Appeal from the Council. The main function, however, of the Assembly is to receive reports from the Council and to legislate. It sits for part only of each year, and confines itself closely to the transaction of business. Laws passed by it may, when referred to the people, be vetoed. Its members are constantly re-elected, and it is apparently one of the most orderly and business-like of Parliaments.

The Assembly consists of two chambers or houses. The Council of States, or, as we may more conveniently call it, the Senate, represents the Cantons, each of which sends two members to it. The National Council, like the American House of Representatives, directly represents the citizens. It



varies in numbers with the growth of the population, and each Canton is represented in proportion to its population.

In one important respect the Federal Assembly differs from the American Congress. In the United States the Senate has hitherto been the more influential of the two Houses. In Switzerland the Council of States was expected by the founders of the constitution to wield the sort of authority which belongs to the American Senate. This expectation has been disappointed. The Council of States has played quite a secondary part in the working of the constitution, and possesses much less influence than the National Council. The reasons given for this are various. The chief explanation of the greater political importance of the National Council is the presence there of the influence of the political parties to a greater extent than in the other Councils. It is elected on the basis of proportional representation of the different parties. Because party influence moulds political opinion, debates in the National Council attract more public attention and interest than those of the Council of States. Broadly speaking the National Council, like the French Chamber, reflects active politics, the Council of States, like the Senate, moderating opinion. The members of the Council are paid by the Cantons which they represent. The time for which they hold office is regulated by each Canton. The Council has no special functions, such as has the American Senate, and the general result has been that leading statesmen have sought for seats not in the Council of States, but in the National Council.

III. *The Federal Tribunal*.—This court was constituted by statesmen who knew the weight and authority which belongs to the Supreme Court of the United States; but the Federal Tribunal was from the beginning, and is still, a very different body from, and a much less powerful body than, the American Supreme Court. It is composed of twenty-six judges, and nine substitutes elected for six years by the Federal Assembly, which also designates the President and the Vice-President of the court for two years at a time.<sup>1</sup> It possesses criminal

<sup>1</sup> *Loi d'organisation judiciaire fédérale* (1893), art. 4; Burckhardt, *op. cit.*, pp. 752-803; Fleiner, *op. cit.*, pp. 426-459; article by Prof. Roger Secrétan, "Les recours contre la puissance publique," in the volume (*Suisse*), pp. 103-118.

jurisdiction in cases of high treason, and in regard to what we may term high crimes and misdemeanours, though its powers as a criminal court are rarely put into operation. It has jurisdiction as regards suits between the Confederation and the Cantons, and between the Cantons themselves, and generally in all suits in which the Confederation or a Canton is a party. It also determines most matters of public law, and has by degrees, in consequence of federal legislation, been made virtually a general Court of Appeal from the Cantonal tribunals in all cases arising under federal laws where the amount in dispute exceeds 4000 francs. Add to this that the court entertains complaints of the violation of the constitutional rights of citizens, and this whether the right alleged to be violated is guaranteed by the Federal or by a Cantonal constitution. Since 1908 there have been important alterations in the administrative jurisdiction of this court. In 1914 an amendment to the constitution (Art. 114 *bis*) made possible the creation of a *cour administrative fédérale*. The federal law of June 11th, 1928, *sur la juridiction administrative et disciplinaire* gave to the Federal Tribunal the right to adjudicate administrative disputes, especially in matters of taxation. In other cases, however, the Federal Council, and ultimately in certain cases the Federal Assembly, are still competent to decide administrative disputes (see especially Art. 22 of the law of June 11th, 1928).<sup>1</sup> The validity of Cantonal elections is now decided by the Federal Tribunal, and no longer by the Federal Council.

The Federal Tribunal stands alone, instead of being at the head of a national judicial system. It has further no officials of its own for the enforcement of its judgments. They are executed primarily by the Cantonal authorities, and ultimately, if the Cantonal authorities fail in their duty, by the Federal Council.<sup>2</sup> The control, moreover, exerted by the Federal Tribunal over the acts of Federal officials is incomplete. Any citizen may sue an official; in case there is a conflict of jurisdiction between the Federal Council and the Federal Tribunal, it

<sup>1</sup> See note on p. 610 for examples.

<sup>2</sup> See Adams and Cunningham, *The Swiss Confederation* (1889), pp. 74, 75.

is decided not by the court but by the Federal Assembly.<sup>1</sup> The Federal Tribunal, at any rate, cannot as regards such disputes fix the limits of its own competence.<sup>2</sup> Under these circumstances it is not surprising that the Tribunal exercises less authority than the Supreme Court of the United States. What may excite some surprise is that, from the very nature of federalism, the jurisdiction of the Federal Tribunal has, in spite of all disadvantages under which the court suffers, year by year increased. Thus until 1893 questions relating to religious liberty, and the rights of different sects, were reserved for the decision of the Federal Assembly. Since that date they have been transferred to the jurisdiction of the Federal Tribunal. This very transfer, and the whole relation of the Tribunal, the Council and the Assembly respectively, to questions which would in England or the United States be necessarily decided by a law court, serve to remind the reader of the imperfect recognition in Switzerland of the "rule of law" as the author understood it in England, and of the separation of powers as that doctrine is understood in many continental countries.

IV. *The Referendum and the Initiative.*<sup>3</sup>—If in the constitution of the Federal Tribunal and of the Council of States we can trace the influence of American examples, the referendum, as it exists in Switzerland, is an institution of native growth, which has received there a far more complete and extensive development than in any other country. If we omit all details, and deal with the referendum as it in fact exists under the Swiss Federal Constitution, we may describe it as an arrangement by which no alteration or amendment in the constitution, and no federal law which any large number of Swiss citizens think of importance, comes finally into force until it has been submitted to the vote of the citizens, and has been sanctioned by a majority of the citizens who actually vote. It may be added that a change in the constitution thus referred to the people

<sup>1</sup> See *Swiss Constitution*, Art. 85, s. 13, which provides that the Federal Assembly shall determine questions of the jurisdiction of the several federal authorities, especially between the Federal Tribunal and the Federal Council.

<sup>2</sup> See Lowell, *op. cit.*, p. 220.

<sup>3</sup> See generally upon referendum and initiative M. Battelli, *Les Institutions de démocratie directe en Droit Suisse et comparé moderne* (1932).

for sanction cannot come into force unless it is approved both by a majority of the citizens who vote and by a majority of the Cantons. In the case of an ordinary law passed by the Federal Assembly the law comes into force without a referendum, unless it is demanded by not less than 30,000 citizens. It must further be noted that the referendum in different forms exists in all but one of the Swiss Cantons, and may therefore now be considered an essential feature of Swiss constitutionalism. The referendum is therefore a nation's veto. It gives to the citizens of Switzerland exactly that power of arresting legislation which is still in theory and was in the time, for example, of Elizabeth actually possessed by an English monarch. A Bill could not finally become a law until it had obtained the consent of the Crown. In popular language, the Crown, in case the Monarch dissented, might be said to veto the Bill. A more accurate way of describing the Crown's action is to say that the King threw out or rejected the Bill, just as did the House of Lords or the House of Commons when either body refused to pass a Bill. This is in substance the position occupied by the citizens of Switzerland when a law passed by the Federal Assembly is submitted to them for their approbation or rejection. If they give their assent, it becomes the law of the land; if they refuse their assent, it is vetoed, or, speaking more accurately, the proposed law is not allowed to pass, *i.e.* to become in reality a law.

The referendum has a purely negative effect. It is in all the Cantonal constitutions and in the Federal constitution to a certain extent supplemented by the initiative—that is, a device by which a certain number of citizens can propose an amendment of the constitution and require a popular vote upon it in spite of the refusal of the legislature to adopt their views.<sup>1</sup> The initiative is employed in both Cantonal and Federal matters. In the latter its use is solely to secure amendment of the constitution, *e.g.* Art. 25 (2). For this purpose there are two kinds of initiative, (1) for a total revision of the constitution, (2) for partial amendment. A total revision may be proposed by 50,000 citizens. If it is approved by a majority of the whole people, a general election

<sup>1</sup> See Battelli, *op. cit.*, pp. 35-45; Lowell, *op. cit.*, p. 280.

is held for the Federal Assembly. The new Assembly has the task of framing the new constitution for submission to the people as a whole and to each Canton. A similar number of citizens may propose a partial modification, either in the form of a definite proposal or in general terms for submission to the people and to the Cantons. While the introduction of the initiative is neither in theory nor in fact a necessary consequence of the maintenance of the referendum, both institutions are examples of the way in which in Switzerland the citizens take a direct part in legislation.

The referendum, taken in combination with the other provisions of the constitution, and with the general character of Swiss federalism, tends, it is conceived, to produce the following effect. It alters the position both of the Legislature and of the Executive. The Assembly and the Federal Council become obviously the agents of the Swiss people. This state of things, while it decreases the power, may also increase the freedom of Swiss statesmen. A member of the Council, or the Council itself, proposes a law which is passed by the Legislature. It is, we will suppose, as has often happened, referred to the people for approval and then rejected. The Council and the Assembly bow without any discredit to the popular decision. There is no reason why the members either of the Council or of the Legislature should resign their seats; it has frequently happened that the electors, whilst disapproving of certain laws submitted for their acceptance by the Federal Assembly, have re-elected the very men whose legislation they have refused to accept. Individual politicians, on the other hand, who advocate particular measures, just because the failure to pass these measures into law does not involve resignation or expulsion from office, can openly express their political views, even if these views differ from the opinions of the people. But the influence of party government, as in England, is marked.

Swiss Federalism has been, as we have already pointed out, considerably influenced by American Federalism, and it is almost impossible for an intelligent student not to compare the most successful federal and democratic Government of the New World with the most successful federal and democratic Government of Europe, for the history and the institutions of



America and of Switzerland exhibit just that kind of likeness and unlikeness which excites comparison.

The United States and Switzerland are both by nature federations ; neither country could, it is pretty clear, prosper under any but a federal constitution ; both countries are, at the present day at any rate, by nature democracies. In each country the States or Cantons have existed before the federation. In each country State patriotism was originally a far stronger sentiment than the feeling of national unity. In America and in Switzerland national unity has been the growth of necessity. It is also probable that the sentiment of national unity, now that it has been once evoked, will in the long run triumph over the feeling of State rights or State sovereignty. In a very rough manner, moreover, there is a certain likeness between what may be called the federal history of both countries. In America and in Switzerland there existed for a long time causes which prevented and threatened finally to arrest the progress towards national unity. Slavery played in the United States a part which resembled at any rate the part played in Swiss history by religious divisions. In America and in Switzerland a less progressive but united and warlike minority of States held for a long time in check the influence of the richer, the more civilised and the less united States. Constant disputes as to the area of slavery bore at any rate an analogy to the disputes about the common territories which at one time divided the Catholic and Protestant Cantons. Secession was anticipated by the Sonderbund in 1846, and the triumph of Grant was not more complete than the triumph of Dufour. Nor is it at all certain that the military genius of the American was greater than the military genius of the Swiss general. The War of Secession and the War of the Sonderbund had this further quality in common. They each absolutely concluded the controversies out which of they had arisen ; they each so ended that victors and vanquished alike soon became the loyal citizens of the same Republic. Each country, lastly, may attribute its prosperity, with plausibility at least, to its institutions, and these institutions bear in their general features a marked similarity.



The unlikeness, however, between American and Swiss Federalism is at least as remarkable as the likeness. America is the largest as Switzerland is the smallest of Confederations ; more than one American State exceeds in size and population the whole of the Swiss Confederacy. The American Union is from every point of view a modern State ; the heroic age of Switzerland, as far as military glory is concerned, had closed before a single European had set foot in America, and the independence of Switzerland was acknowledged by Europe more than a century before the United States began their political existence. American institutions are the direct outgrowth of English ideas, and in the main of the English ideas which prevailed in England during the democratic movement of the seventeenth century ; American society was never under the influence of feudalism. The democracy of Switzerland is imbued in many respects with continental ideas of government, and till the time of the great French Revolution, Swiss society was filled with inequalities originating in feudal ideas. The United States is made up of States which have always been used to representative institutions ; the Cantons of Switzerland have been mainly accustomed to non-representative, aristocratic or democratic government. Under these circumstances it is naturally to be expected that even institutions which possess a certain formal similarity should display an essentially different character in countries which differ so widely as the United States and Switzerland.

The Senate and the Judiciary of the United States have rightly excited more admiration than any other part of the American constitution. They have each been, to a certain extent, imitated by the founders of the existing Swiss Republic. The features in American institutions which receive very qualified approval, if not actual censure even from favourable critics, are the mode in which the President is appointed, the relation of the Executive Government to the Houses of Congress, the disastrous development of party organisation, and the waste or corruption which are the consequence of the predominance of party managers or wirepullers.

The Federal Council, on the other hand, forms as good an Executive as is possessed by any country in the world. It

would appear to a foreign observer (though on such a matter foreign critics are singularly liable to delusion) to combine in a rare degree the advantages of a parliamentary and of a non-parliamentary Government. It acts in uniform harmony with the elected representatives of the people, but though appointed by the legislature, it enjoys a permanent tenure of office unknown to parliamentary Cabinets or to elected Presidents. Though parties, again, exist, and party spirit occasionally runs high in Switzerland, party government is not found there to be a necessity. The evils, at any rate, attributed to government by party are either greatly diminished or entirely averted. The Caucus and the "Machine" are all but unknown. The country is freed from the unwholesome excitement of a presidential election, or even of a general election, which, as in England, determines which party shall have possession of the government. There is no notion of spoils, and no one apparently even hints at corruption.

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## SECTION V

### DUTY OF SOLDIERS CALLED UPON TO DISPERSE AN UNLAWFUL ASSEMBLY <sup>1</sup>

On September 7th, 1893, Captain Barker and a small number of soldiers were placed in the Ackton Colliery, in order to defend it from the attack of a mob. A body of rioters armed with sticks and cudgels entered the colliery yard, and with threats demanded the withdrawal of the soldiers. The mob gradually increased, and broke the windows of the building in which the troops were stationed and threw stones at them. Attempts were made to burn the building, and timber was actually set on fire. The soldiers retreated, but were at last surrounded by a mob of 2000 persons. The crowd was called upon to disperse, and the Riot Act read. More stones were hurled at the troops, and it was necessary to protect the colliery. At last, before an hour from the reading of the Riot

<sup>1</sup> Reproduced as in eighth edition.

Act, and on the crowd refusing to disperse, Captain Barker gave orders to fire. The mob dispersed, but one or two bystanders were killed who were not taking an active part in the riot. Commissioners, including Lord Justice Bowen, afterwards Lord Bowen, were appointed to report on the conduct of the troops. The following passage from the report is an almost judicial statement of the law as to the duty of soldiers when called upon to disperse a mob :—

We pass next to the consideration of the all-important question whether the conduct of the troops in firing on the crowd was justifiable ; and it becomes essential, for the sake of clearness, to state succinctly what the law is which bears upon the subject. By the law of this country every one is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained.

The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act, and who resist the attempt to disperse or apprehend them. The riotous crowd at the Ackton Hall Colliery was one whose danger consisted in its manifest design violently to set fire and do serious damage to the colliery property, and in pursuit of that object to assault those upon the colliery premises. It was a crowd accordingly which threatened serious outrage, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on person and property justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.

Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself if without necessity he takes human life. The duty of magistrates and peace officers to summon or to abstain from summoning the assistance of the military depends in like manner on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. They

cannot be employed at all without danger to life and limb, and in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanour.

The whole action of the military when once called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance or defines beforehand every contingency that may arise. One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance. The military come, it may be, from a distance. They know nothing, probably, of the locality, or of the special circumstances. They find themselves introduced suddenly on a field of action, and they need the counsel of the local justice, who is presumably familiar with the details of the case. But, although the magistrate's presence is of the highest value and moment, his absence does not alter the duty of the soldier, nor ought it to paralyse his conduct, but only to render him doubly careful as to the proper steps to be taken. No officer is justified by English law in standing by and allowing felonious outrage to be committed merely because of a magistrate's absence.

The question whether, on any occasion, the moment has come for firing upon a mob of rioters, depends, as we have said, on the necessities of the case. Such firing, to be lawful, must, in the case of a riot like the present, be necessary to stop or prevent such serious and violent crime as we have alluded to; and it must be conducted without recklessness or negligence. When the need is clear, the soldier's duty is to fire with all reasonable caution, so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favour of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists.

With the above doctrines of English law the Riot Act does not

interfere. Its effect is only to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony; and on this ground to afford a statutory justification for dispersing a felonious assemblage, even at the risk of taking life. In the case of the Ackton Hall Colliery, an hour had not elapsed after what is popularly called the reading of the Riot Act, before the military fired. No justification for their firing can, therefore be rested on the provisions of the Riot Act itself, the further consideration of which may indeed be here dismissed from the case. But the fact that an hour had not expired since its reading did not incapacitate the troops from acting when outrage had to be prevented. All their common law duty as citizens and soldiers remained in full force. The justification of Captain Barker and his men must stand or fall entirely by the common law. Was what they did necessary, and no more than was necessary, to put a stop to or prevent felonious crime? In doing it, did they exercise all ordinary skill and caution, so as to do no more harm than could be reasonably avoided?

If these two conditions are made out, the fact that innocent people have suffered does not involve the troops in legal responsibility. A guilty ringleader who under such conditions is shot dead, dies by justifiable homicide. An innocent person killed under such conditions, where no negligence has occurred, dies by an accidental death. The legal reason is not that the innocent person has to thank himself for what has happened, for it is conceivable (though not often likely) that he may have been unconscious of any danger and innocent of all imprudence. The reason is that the soldier who fired has done nothing except what was his strict legal duty.

In measuring with the aid of subsequent evidence the exact necessities of the case as they existed at the time at Ackton Hall Colliery, we have formed a clear view that the troops were in a position of great embarrassment. The withdrawal of half their original force to Nostell Colliery had reduced them to so small a number as to render it difficult for them to defend the colliery premises effectively at night-time. The crowd for some hours had been familiarised with their presence, and had grown defiant. All efforts at conciliation had failed. Darkness had meanwhile supervened, and it was difficult for Captain Barker to estimate the exact number of his assailants, or to what extent he was being surrounded and outflanked. Six or seven appeals had been made by the magistrate to the crowd. The Riot Act had been read without result. A charge had been made without avail. Much valuable colliery property was already blazing, and the troops were with difficulty keeping at bay a mob armed with sticks and



bludgeons, which was refusing to disperse, pressing where it could into the colliery premises, stoning the fire-engine on its arrival, and keeping up volleys of missiles. To prevent the colliery from being overrun and themselves surrounded, it was essential for them to remain as close as possible to the Green Lane entrance. Otherwise, the rioters would, under cover of the darkness, have been able to enter in force. To withdraw from their position was, as we have already intimated, to abandon the colliery offices in the rear to arson and violence. To hold the position was not possible, except at the risk of the men being seriously hurt and their force crippled. Assaulted by missiles on all sides, we think that, in the events which had happened, Captain Barker and his troops had no alternative left but to fire, and it seems to us that Mr. Hartley was bound to require them to do so.

It cannot be expected that this view should be adopted by many of the crowd in Green Lane who were taking no active part in the riotous proceedings. Such persons had not, at the time, the means of judging of the danger in which the troops and the colliery stood. But no sympathy felt by us for the injured bystanders, no sense which we entertain of regret that, owing to the smallness of the military force at Featherstone and the prolonged absence of a magistrate, matters had drifted to such a pass, can blind us to the fact that, as things stood at the supreme moment when the soldiers fired, their action was necessary. We feel it right to express our sense of the steadiness and discipline of the soldiers in the circumstances. We can find no ground for any suggestion that the firing, if it was in fact necessary, was conducted with other than reasonable skill and care. The darkness rendered it impossible to take more precaution than had been already employed to discriminate between the lawless and the peaceable, and it is to be observed that even the first shots fired produced little or no effect upon the crowd in inducing them to withdraw. If our conclusions on these points be, as we believe them to be, correct, it follows that the action of the troops was justified in law.<sup>1</sup>

<sup>1</sup> Report of the Committee appointed to inquire into the circumstances connected with the disturbances at Featherstone on the 7th of September, 1893 [C.—7234].



## SECTION VI

## STATUTES

## PUBLIC AUTHORITIES PROTECTION ACT, 1893

[56 &amp; 57 Vict. Ch. 61.]

An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties.

[5th December 1893.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

- (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof :<sup>1</sup>

<sup>1</sup> Consequent upon the recommendation of the Law Revision Committee (Fifth Interim Report, 1936) a Limitations Bill has been drafted which provides (*inter alia*) for the repeal of para. (a), except as regards criminal proceedings, and substitutes one year for six months. The clause is as follows :

Clause 21 (1) No action shall be brought against any person for an act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued :

- Provided that, where the act, neglect or default is a continuing one, no

- (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client :
- (c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment ; but this provision shall not affect costs on any injunction in the action :
- (d) If, in the opinion of the court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the court may award to the defendant costs to be taxed as between solicitor and client.

This section shall not affect any proceedings by any Department of the Government against any local authority or officer of a local authority.

2. There shall be repealed as to the United Kingdom so much of any public general Act as enacts that in any proceeding to which this Act applies—

- (a) the proceeding is to be commenced in any particular place ; or
- (b) the proceeding is to be commenced within any particular time ; or
- (c) notice of action is to be given ; or

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cause of action in respect thereof shall be deemed to have accrued, for the purposes of this subsection, until the act, neglect or default has ceased.

Part II of the Bill provides (*inter alia*) for the extension of the limitation period in the case of disability to one year from death or the ceasing of the disability, whichever first occurs, and for the postponement of the period in cases of concealed fraud until discovery of the fraud or until it would have been discovered with reasonable diligence.

- (d) the defendant is to be entitled to any particular kind or amount of costs, or the plaintiff is to be deprived of costs in any specified event ; or
- (e) the defendant may plead the general issue ;

and in particular there shall be so repealed the enactments specified in the schedule to this Act to the extent in that schedule mentioned.

This repeal shall not affect any proceeding pending at the commencement of this Act.

3. This Act shall not apply to any action, prosecution, or other proceeding for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of Parliament, or on account of any act done in any case instituted under an Act of Parliament when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding.

4. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

5. This Act may be cited as the Public Authorities Protection Act, 1893.

SCHEDULE.—*Enactments repealed* (The Schedule covers 10½ pages).

#### PARLIAMENT ACT, 1911

[1 & 2 Geo. 5. Ch. 13.]

An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament.

[18th August 1911.]

Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament :

And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on

a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation :

And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords :

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. (1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the House of Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.

(2) A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation ; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges ; supply ; the appropriation, receipt, custody, issue or audit of accounts of public money ; the raising or guarantee of any loan or the repayment thereof ; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions "taxation," "public money," and "loan" respectively do not include any taxation money, or loan raised by local authorities or bodies for local purposes.

(3) There shall be endorsed on every Money Bill when it is sent up to the House of Lords and when it is presented to,

His Majesty for assent the certificate of the Speaker of the House of Commons signed by him that it is a Money Bill. Before giving his certificate, the Speaker shall consult, if practicable, two members to be appointed from the Chairmen's Panel at the beginning of each Session by the Committee of Selection.

2. (1) If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions.

(2) When a Bill is presented to His Majesty for assent in pursuance of the provisions of this section, there shall be endorsed on the Bill the certificate of the Speaker of the House of Commons signed by him that the provisions of this section have been duly complied with.

(3) A Bill shall be deemed to be rejected by the House of Lords if it is not passed by the House of Lords either without amendment or with such amendments only as may be agreed to by both Houses.

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the House of Lords in the preceding session if, when it is sent up to the House of Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker of the House of Commons to be necessary owing to the time which has elapsed since the date of the former Bill, or to represent any amendments which have been

made by the House of Lords in the former Bill in the preceding session, and any amendments which are certified by the Speaker to have been made by the House of Lords in the third session and agreed to by the House of Commons shall be inserted in the Bill as presented for Royal Assent in pursuance of this section :

Provided that the House of Commons may, if they think fit, on the passage of such a Bill through the House in the second or third session, suggest any further amendments without inserting the amendments in the Bill, and any such suggested amendments shall be considered by the House of Lords, and, if agreed to by that House, shall be treated as amendments made by the House of Lords, and agreed to by the House of Commons ; but the exercise of this power by the House of Commons shall not affect the operation of this section in the event of the Bill being rejected by the House of Lords.

3. Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

4. (1) In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say :—

“ Be it enacted by the King’s most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows.”

(2) Any alteration of a Bill necessary to give effect to this section shall not be deemed to be an amendment of the Bill.

5. In this Act the expression “ Public Bill ” does not include any Bill for confirming a Provisional Order.

6. Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons.

7. Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715.

8. This Act may be cited as the Parliament Act, 1911.



STATUTE OF WESTMINSTER, 1931

[22 Geo. 5. Ch. 4.]

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December 1931.]

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences :

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom :

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion :

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom :

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South

Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained :

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.<sup>1</sup>

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that

<sup>1</sup> In 1933 the form of self-government in Newfoundland was, with the assent of the Legislature, suspended by the Parliament of the United Kingdom: Newfoundland Act, 1933. For the present form of the constitution, which excludes the operation of the Statutes of Westminster, see Wade and Phillips, *Constitutional Law* (2nd ed., 1935), p. 441.

that Dominion has requested, and consented to, the enactment thereof.

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9. (1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of

Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10. (1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

## PUBLIC ORDER ACT, 1936

[1 Edw. 8 &amp; 1 Geo. 6. (Ch. 6.)]

An Act to prohibit the wearing of uniforms in connection with political objects and the maintenance by private persons of associations of military or similar character; and to make further provision for the preservation of public order on the occasion of public processions and meetings and in public places.

(18th December 1936.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Subject as hereinafter provided, any person who in any public place or at any public meeting wears uniform signifying his association with any political organisation or with the promotion of any political object shall be guilty of an offence:

Provided that, if the chief officer of police is satisfied that the wearing of any such uniform as aforesaid on any ceremonial, anniversary, or other special occasion will not be likely to involve risk of public disorder, he may, with the consent of a Secretary of State, by order permit the wearing of such uniform on that occasion either absolutely or subject to such conditions as may be specified in the order.

(2) Where any person is charged before any court with an offence under this section, no further proceedings in respect thereof shall be taken against him without the consent of the Attorney-General except such as the court may think necessary by remand (whether in custody or on bail) or otherwise to secure the due appearance of the person charged, so, however, that if that person is remanded in custody he shall, after the expiration of a period of eight days from the date on which he was so remanded, be entitled to be discharged from custody on entering into a recognisance without sureties unless within that period the Attorney-General has consented to such further proceedings as aforesaid.

2.—(1) If the members or adherents of any association of persons, whether incorporated or not, are—

- (a) organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown ; or
- (b) organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose ;

then any person who takes part in the control or management of the association, or in so organising or training as aforesaid any members or adherents thereof, shall be guilty of an offence under this section :

Provided that in any proceedings against a person charged with the offence of taking part in the control or management of such an association as aforesaid it shall be a defence to that charge to prove that he neither consented to nor connived at the organisation, training, or equipment of members or adherents of the association in contravention of the provisions of this section.

(2) No prosecution shall be instituted under this section without the consent of the Attorney-General.

(3) If upon application being made by the Attorney-General it appears to the High Court that any association is an association of which members or adherents are organised, trained, or equipped in contravention of the provisions of this section, the Court may make such order as appears necessary to prevent any disposition without the leave of the Court of property held by or for the association and in accordance with rules of court may direct an inquiry and report to be made as to any such property as aforesaid and as to the affairs of the association and make such further orders as appear to the Court to be just and equitable for the application of such property in or towards the discharge of the liabilities of the association lawfully incurred before the date of the application or since that date with the approval



of the Court, in or towards the repayment of moneys to persons who became subscribers or contributors to the association in good faith and without knowledge of any such contravention as aforesaid, and in or towards any costs incurred in connection with any such inquiry and report as aforesaid or in winding-up or dissolving the association, and may order that any property which is not directed by the Court to be so applied as aforesaid shall be forfeited to the Crown.

(4) In any criminal or civil proceedings under this section proof of things done or of words written, spoken or published (whether or not in the presence of any party to the proceedings) by any person taking part in the control or management of an association or in organising, training or equipping members or adherents of an association shall be admissible as evidence of the purposes for which, or the manner in which, members or adherents of the association (whether those persons or others) were organised, or trained, or equipped.

(5) If a judge of the High Court is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this section has been committed, and that evidence of the commission thereof is to be found at any premises or place specified in the information, he may, on an application made by an officer of police of a rank not lower than that of inspector, grant a search warrant authorising any such officer as aforesaid named in the warrant together with any other persons named in the warrant and any other officers of police to enter the premises or place at any time within one month from the date of the warrant, if necessary by force, and to search the premises or place and every person found therein, and to seize anything found on the premises or place or on any such person which the officer has reasonable ground for suspecting to be evidence of the commission of such an offence as aforesaid :

Provided that no woman shall, in pursuance of a warrant issued under this subsection, be searched except by a woman.

(6) Nothing in this section shall be construed as prohibiting the employment of a reasonable number of persons as stewards to assist in the preservation of order at any public meeting held upon private premises, or the making of arrange-

ments for that purpose or the instruction of the persons to be so employed in their lawful duties as such stewards, or their being furnished with badges or other distinguishing signs.

3.—(1) If the chief officer of police, having regard to the time or place at which and the circumstances in which any public procession is taking place or is intended to take place and to the route taken or proposed to be taken by the procession, has reasonable ground for apprehending that the procession may occasion serious public disorder, he may give directions imposing upon the persons organising or taking part in the procession such conditions as appear to him necessary for the preservation of public order, including conditions prescribing the route to be taken by the procession and conditions prohibiting the procession from entering any public place specified in the directions :

Provided that no conditions restricting the display of flags, banners, or emblems shall be imposed under this subsection, except such as are reasonably necessary to prevent risk of a breach of the peace.

(2) If at any time the chief officer of police is of opinion that by reason of particular circumstances existing in any borough or urban district or in any part thereof the powers conferred on him by the last foregoing subsection will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions in that borough, district or part, he shall apply to the council of the borough or district for an order prohibiting for such period not exceeding three months as may be specified in the application the holding of all public processions or of any class of public procession so specified either in the borough or urban district or in that part thereof, as the case may be, and upon receipt of the application the council may, with the consent of a Secretary of State, make an order either in terms of the application or with such modifications as may be approved by the Secretary of State.

This subsection shall not apply within the City of London as defined for the purposes of the Acts relating to the City police or within the Metropolitan police district.

(3) If at any time the Commissioner of the City of London police or the Commissioner of police of the Metropolis is of opinion that, by reason of particular circumstances existing in his police area or in any part thereof, the powers conferred on him by subsection (1) of this section will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions in that area or part, he may, with the consent of the Secretary of State, make an order prohibiting for such period not exceeding three months as may be specified in the order the holding of all public processions or of any class of public procession so specified either in the police area or in that part thereof, as the case may be.

(4) Any person who knowingly fails to comply with any directions given or conditions imposed under this section, or organises or assists in organising any public procession held or intended to be held in contravention of an order made under this section or incites any person to take part in such a procession, shall be guilty of an offence.

4.—(1) Any person who, while present at any public meeting or on the occasion of any public procession, has with him any offensive weapon, otherwise than in pursuance of lawful authority, shall be guilty of an offence.

(2) For the purposes of this section, a person shall not be deemed to be acting in pursuance of lawful authority unless he is acting in his capacity as a servant of the Crown or of either House of Parliament or of any local authority or as a constable or as a member of a recognised corps or as a member of a fire brigade.

5. Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence.

6. Section one of the Public Meeting Act, 1908, (which provides that any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together, or incites others so to act, shall be guilty of an

offence) shall have effect as if the following subsection were added thereto—

“(3) If any constable reasonably suspects any person of committing an offence under the foregoing provisions of this section, he may if requested so to do by the chairman of the meeting require that person to declare to him immediately his name and address and, if that person refuses or fails so to declare his name and address or gives a false name and address he shall be guilty of an offence under this subsection and liable on summary conviction thereof to a fine not exceeding forty shillings, and if he refuses or fails so to declare his name and address or if the constable reasonably suspects him of giving a false name and address, the constable may without warrant arrest him.”

7.—(1) Any person who commits an offence under section two of this Act shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds, or to both such imprisonment and fine, or, on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine.

(2) Any person guilty of any other offence under this Act shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding fifty pounds, or to both such imprisonment and fine.

(3) A constable may without warrant arrest any person reasonably suspected by him to be committing an offence under section one, four or five of this Act.

8. This Act shall apply to Scotland subject to the following modifications :—

(1) Subsection (2) of section one and subsection (2) of section two of this Act shall not apply.

(2) In subsection (3) of section two the Lord Advocate shall be substituted for the Attorney-General and the Court of Session shall be substituted for the High Court.

- (3) Subsection (5) of section two shall have effect as if for any reference to a judge of the High Court there were substituted a reference to the sheriff and any application for a search warrant under the said subsection shall be made by the procurator fiscal instead of such officer as is therein mentioned.
- (4) The power conferred on the sheriff by subsection (5) of section two, as modified by the last foregoing paragraph, shall not be exercisable by an honorary sheriff-substitute.
- (5) Subsection (1) of section three of this Act shall in its application to a burgh have effect with the substitution of references to the magistrates of the burgh for references to the chief officer of police, and any reference to the powers conferred by the said subsection shall be construed accordingly.
- (6) In subsection (2) of section three and in subsection (3) of section nine of this Act for references to a borough or urban district and to the council thereof there shall be substituted respectively references to a burgh and to the magistrates thereof.

9.—(1) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say :—

“ Chief officer of police ” has the same meaning as in the Police Pensions Act, 1921 ;

“ Meeting ” means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters ;

“ Private premises ” means premises to which the public have access (whether on payment or otherwise) only by permission of the owner, occupier, or lessee of the premises ;

“ Public meeting ” includes any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise ;

“ Public place ” means any highway, public park or

garden, any sea beach, and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise;

"Public procession" means a procession in a public place;

"Recognised corps" means a rifle club, miniature rifle club or cadet corps approved by a Secretary of State under the Firearms Acts, 1920 to 1936, for the purposes of those Acts.

(2) The powers conferred by this Act on the Attorney-General may, in the event of a vacancy in the office or in the event of the Attorney-General being unable to act owing to illness or absence, be exercised by the Solicitor-General.

(3) Any order made under this Act by the council of any borough or urban district or by a chief officer of police may be revoked or varied by a subsequent order made in like manner.

(4) The powers conferred by this Act on any chief officer of police may, in the event of a vacancy in the office or in the event of the chief officer of police being unable to act owing to illness or absence, be exercised by the person duly authorised in accordance with directions given by a Secretary of State to exercise those powers on behalf of the chief officer of police.

10.—(1) This Act may be cited as the Public Order Act, 1936.

(2) This Act shall not extend to Northern Ireland.

(3) This Act shall come into operation on the first day of January nineteen hundred and thirty-seven.



## ADDENDA

- P. 582. On February 14, 1939, a Bill to amend s. 6 of the Official Secrets Act, 1920, was introduced in the House of Lords by the Lord Chancellor. The special powers of interrogation by the police are in future only to apply in cases covered by s. 1 of the Official Secrets Act, 1911, which relates to espionage.
- P. 592. An amended and fuller version of the Law of Libel (Amendment) Bill, 1938, was debated on second reading in the House of Commons on February 3, 1939. The Bill was withdrawn by its sponsor, Sir Stanley Reed, upon receiving an undertaking from the Attorney-General that His Majesty's Government would set up a Committee to consider the law of defamation.
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